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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1785

NELSON G. GROSS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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NELSON G. GROSS,
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v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nelson G. Gross petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on April 22, 1976.

Opinions Below

As of the date of preparation of this petition, neither the order of the United States Court of Appeals for the Third Circuit denying petitioner's Petition for Re-

hearing (25a) and the opinion of that court (83a), nor the opinion and order of the United States District Court for the District of New Jersey (26a) is reported.

This case was originally decided on May 15, 1974, in the United States District Court for the District of New Jersey and the Opinion of the court is reported at 375 F.Supp. 971. The United States Court of Appeals for the Third Circuit subsequently affirmed the conviction on February 19, 1975, on an opinion reported at 511 F.2d 910 and denied petitioners' Petition for Rehearing on April 2, 1975. This court denied certiorari on November 3, 1975, reported at 44 U.S.L.W. 3258.

Jurisdiction

The judgment of the Court of Appeals was entered on April 22, 1976. A Petition for Rehearing was timely filed on April 28, 1976, and was denied on May 11, 1976.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Constitutional Provisions and Statutes Involved

The Fifth Amendment of the Constitution of the United States provides:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . No person shall be held to answer for (an) . . . infamous crime unless on a presentment or indictment of a grand jury.

The Sixth Amendment of the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial, by an impartial jury . . ., to be informed of the nature and cause of the accusation [and] to be confronted with the witnesses against him . . .

Questions Presented

1. Where the government used the Fifth Amendment plea of an alleged co-conspirator against petitioner, the defendant in a criminal case, may it take contradictory positions to justify the admission of that evidence simply in order to make its case agree with the facts before the court at the time?

2. Where the Fifth Amendment plea of petitioner's alleged co-conspirator has been admitted against petitioner solely on the basis of the argument that the plea corroborated the testimony of the chief witness against petitioner, must not petitioner be granted a new trial upon the government's assertion that the Fifth Amendment plea may well not have been corroborative at all?

3. Assuming that the Fifth Amendment plea of petitioner's alleged co-conspirator retained some value as corroborative evidence, is not petitioner entitled to a new trial because the co-conspirator has now become available for the first time to testify that his plea was made without consultation with or knowledge of petitioner?

Statement

This petition raises the question of whether the United States may, without violating the Fifth and Sixth Amendments, use against a defendant in a criminal case the fact that his alleged co-conspirator when questioned about the central facts of the conspiracy, claimed his Fifth Amendment right to remain silent. More specifically, it raises the question of whether the government, having originally argued successfully that the co-conspirator's Fifth Amendment plea was properly introduced as corroboration of the testimony of its chief witness may now sustain the resulting conviction despite its repudiation of the corroboration theory in the affidavit of the co-conspirator that completely contradicted the facts which formed the basis for the corroboration theory.

Reduced to its simplest terms, the charges in this case are that petitioner, together with Cahill finance director Joseph McCrane, had induced William Preis, the president of Triple S Blue Stamp (Stop and Save) Company, to make a lawful $5000 corporate contribution to the William Cahill gubernatorial campaign in New Jersey by providing the corporation the means to treat the contribution as a tax-deductible business expense through the use of an invoice of a public relations firm called Writers Associates. Thereafter, petitioner was alleged to have persuaded Preis to lie to the federal grand jury investigating the Cahill campaign. According to Preis, his admitted perjury had been induced by the statement of petitioner that Preis could safely lie to the grand jury since he could not possibly be found out unless petitioner or his alleged co-conspirator McCrane were to testify against him "[a]nd I happen to know that Joe McCrane is going to plead the Fifth when he comes up for his hearing . . ." (Tr. 2009). The government then introduced, over petitioner's objection, testimony that McCrane did appear before the grand jury and, when questioned whether he had directed "anyone to issue false and fictitious invoices from Writers Associates . . . Stop and Save Company . . ." claimed his Fifth Amendment right to silence (Tr. 2862).

In support of the use of the Fifth Amendment plea over the objection of petitioner's counsel, the United States Attorney argued both in advance of the introduction of the Fifth Amendment plea (Tr. 2753-61), on the morning of the day the plea was introduced (Tr. 2764-66, 2781-85), during the introduction of the guilty plea testimony itself (Tr. 2855-64), and his summation to the jury (*e.g.*, Tr. 4801-02) that the McCrane Fifth Amendment plea could be introduced as evidence of the conspiracy and to corroborate the testimony of the witness Preis. (The pages of the trial transcript cited above are attached hereto as Exhibit A).

In affirming petitioner's conviction, the court of appeals had specifically rejected petitioner's argument that the McCrane Fifth Amendment plea was used against him as the declaration of a co-conspirator. Instead, it had held that the district court "in the proper exercise of its discretion, admitted the evidence, with the appropriate cautionary instructions, for the specific and limited purpose of corroborating Preis' unobjected to testimony that petitioner had said: 'And I happen to know that Joe McCrane is going to plead the Fifth when he comes up for his hearing . . .' (Tr. 2009, 2632, 2779-81, 2863-64). Because the Court did not admit this evidence under the co-conspirator's exception to the hearsay rule, we fail to see how this prejudiced appellant." (511 F.2d at 916-17 (footnote omitted)).

Petitioner's case on direct appeal was argued in the court of appeals on the very day on which his co-conspira-

tor, Joseph McCrane was acquitted of the counts in the indictment against him which paralleled the charges against petitioner. As a result, McCrane became available as a witness for petitioner and offered his affidavit to establish that the McCrane Fifth Amendment plea did not serve to corroborate the testimony of the witness Preis. Rather McCrane swore that he was prepared to testify on behalf of petitioner that:

> At no time prior to my assertion before the Grand Jury on April 27, 1973, of my right not to testify on Fifth Amendment grounds, did I ever tell Nelson Gross that I would assert such a plea. Indeed, until April 21, 1973, well after Gross' purported statement to Preis, I had not discussed with my attorneys or anyone else what action I would take if I were to be called before the Grand Jury. In fact, I was out of the country on a vacation when a Grand Jury subpoena was served upon my wife on April 6, 1973, and I did not return to the country so that I could discuss this matter with anyone until April 21, 1973.

(Affidavit of Joseph McCrane, p. 4, Exhibit B to the Petition for Rehearing in No. 74-1694, Exhibit B to the Motion for New Trial, and Exhibit B attached hereto).

The court of appeals having affirmed his conviction, petitioner sought rehearing, arguing that this new sworn testimony destroyed the government's only justification for the admission of the McCrane Fifth Amendment against petitioner and the court of appeals' basis for affirming his conviction. The court of appeals ruled with respect to these matters:

> 2. Points 2, 9 and 10 of Appellant's petition for rehearing (concerning the availability of McCrane and new evidence revealed at his two trials) are more properly matters to be brought to the attention of the trial court in a motion under F.R.Cr.P. 33.
>
> 3. We express no opinion on the merits of points 2, 9 and 10.

(Order denying petition for panel hearing). The Solicitor General took the same position in the Brief for the United States in Opposition to the Petition for Certiorari. Brief in Opposition, No. 74-1511, p. 19 n. 13. Certiorari was denied and, following the advice of the court of appeals, petitioner returned to the district court wherein he filed a Rule 33 motion for a new trial urging, inter alia, that the McCrane affidavit destroyed the only possible basis for the admission of the highly prejudicial evidence that petitioner's alleged co-conspirator had taken the Fifth Amendment when questioned about the central facts of the conspiracy. Nevertheless, the district court denied relief, and petitioner once again appealed to the United States Court of Appeals for the Third Circuit.

This time the United States Attorney, having successfully convinced one panel of the court of appeals that the McCrane Fifth Amendment plea was admissible, despite its plainly prejudicial effect, because it served to corroborate the testimony of the witness Preis that petitioner had predicted the Fifth Amendment plea, then argued to a second panel in the present appeal that the McCrane affidavit provided no basis for a new trial because it did not directly contradict the testimony of the witness Preis:

> Moreover, it does not, as appellant asserts (App. Br., p. 40), contradict Preis' testimony that appellant had told him that, if called to testify before a grand jury, McCrane would invoke the Fifth

Amendment. Appellant's statement to Preis in this regard could have been a prediction based both on his knowledge as a lawyer and former Assistant United States Attorney and his knowledge of McCrane's personality and activities. Indeed, appellant could simply have been making this statement without any knowledge or basis whatever solely to induce Preis to lie. McCrane's affidavit does not, therefore, tend to prove that appellant did not make the statement to Preis.[3]

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3. In this connection, it should be noted that Preis did not even testify that appellant told him that McCrane had told him he would invoke the Fifth Amendment. His exact testimony was: "I happen to know that Joe McCrane is going to plead the Fifth when he comes up for his hearing. . . ." (T. 2008-09).

(Brief for Appellee in No. 75-2375, 3d Cir., pp. 13-14).

Faced with this argument, the panel of the court of appeals (which contained no members of the panel which had heard and decided the original direct appeal) held:

> At Gross' trial, Preis testified that Gross commented, "I happen to know that Joe McCrane is going to plead the Fifth. . . ." McCrane's affidavit does not contradict this critical statement. Rather, it merely states that *he* did not tell Gross. In addition to the chance that Gross might have received the knowledge indirectly, the defendant might have been surmising or anticipating what would happen or he might have been lying to Preis. Either is possible even if the McCrane statement were accepted as correct.

(Opinion of the court of appeals (85a)). Petitioner raised the question of the contradiction between the opinions of the two panels of the court of appeals in a timely petition for rehearing, which was denied. This petition for a writ of certiorari followed.

ARGUMENT

1. By arguing its case in a piecemeal fashion, the government has successfully been able to advance two mutually contradictory positions to justify the use against petitioner of the Fifth Amendment plea of his alleged co-conspirator, despite the fact that neither theory would have been constitutionally acceptable had both been argued at the same time.

From the first day that the McCrane affidavit became available to him, petitioner has sought to have it included in the decision of the matters raised on his original direct appeal, since the existence of that affidavit, if believed, undercuts the whole logic of the government's justification of the introduction against petitioner of the Fifth Amendment plea of his co-conspirator. (The credibility of the McCrane affidavit has never been properly at issue, since the district court refused petitioner's request that McCrane be called as a witness for examination and cross-examination.) The logic of the matter is simple:

If, in fact, Joseph McCrane's Fith Amendment plea came as a result of the independent advice of his counsel, given after the alleged statement of Gross to Preis, and if. as McCrane swears, he never communicated with petitioner concerning the decision to claim his rights un-

der the Fifth Amendment, then it is clear that the evidence of the plea was improperly admitted, for the only basis for the admission of this evidence which has ever been sustained was that it was admissible for the limited purpose of corroborating Preis' testimony that petitioner had told him that McCrane would claim his Fifth Amendment privilege. To the panel of the court of appeals which heard the original direct appeal in this case, the corroborative value of the testimony, given the limiting instructions of the district court, outweighed the prejudicial effect of the evidence of a co-conspirator's Fifth Amendment plea with respect to the very center of the alleged conspiracy. But, when the McCrane affidavit established that his Fifth Amendment plea did not corroborate Preis' testimony, the basis for its admission failed, and only its prejudicial effect remained. That is, the panel of the court which heard this case on the original direct appeal held that the McCrane Fifth Amendment plea could be admitted solely because it corroborated the testimony of the witness Preis; the panel hearing the present appeal held that it made no difference that the McCrane affidavit established that his Fifth Amendment plea corroborated nothing.

There can be no doubt that the admission in evidence that the fact that petitioner's co-conspirator, when questioned before the grand jury concerning the central aspects of the government's case against petitioner, claimed his Fifth Amendment right not to testify was prejudicial to petitioner in the highest degree. Not only was there the danger that the jury may have treated the alleged co-conspirator's plea as the equivalent to the same plea by petitioner, in violation of *Grunewald* v. *United States,* 353 U.S. 391 (1957), but the use of the notes of testimony of the plea against petitioner plainly violated his Sixth Amendment right of confrontation. When the gov-

ernment itself concedes that it is immaterial for purposes of the present appeal whether petitioner had any reason to believe that McCrane would claim his Fifth Amendment plea, the government has likewise admitted that there is not basis for admitting the fact of that plea as corroborative of Preis' testimony that petitioner had predicted it. The government may legitimately take either of the positions it has advanced before the two separate panels of the court of appeals; there is no conceivable justification for the fact that it has taken contradictory positions before two different panels simply because to do so would permit it to defend a conviction.

Although neither the panel of the court of appeals which heard petitioner's original direct appeal nor this Court on the original petition for certiorari could have known that this might occur, the effect of forcing petitioner to litigate the issue of the improper use of Joseph McCrane's Fifth Amendment plea on a piecemeal basis was to permit the government to defend that plea on contradictory bases. The plea was admissible, if at all, because it corroborated William Preis' testimony that petitioner had predicted that McCrane would claim his privilege. But, having successfully defended the conviction on direct appeal on that theory, the government was then faced with the clear sworn statement of McCrane that he had not decided to claim his privilege, let alone discuss the possibility of claiming with petitioner, at the time of the supposed petitioner's statement to Preis. The government replied that McCrane's testimony did not contradict the testimony of Preis, since petitioner might have predicted the Fifth Amendment plea on the basis of intuition or even outright dishonesty. But if petitioner merely guessed or lied about McCrane's Fifth Amendment plea, then the fact that the plea eventually did occur did not corroborate Preis' testimony at all. The gov-

ernment cannot have it both ways. Unless this Court faces the issues presented in the two appeals at one time, the government will be permitted to sustain the conviction in the present appeal on the basis of a theory which demolishes the whole underpinning of the original opinion of the court of appeals and of the brief of the government successfully urging this Court to deny certiorari on the original petition.

Where, as here, the most important constitutional rights of a defendant are involved, the Court cannot permit the government to seek to sustain a conviction by taking two mutually contradictory positions.

2. If McCrane's sworn statement that he never told petitioner of any plans to plead the Fifth Amendment does not conflict with Preis' testimony that petitioner knew McCrane would so plead, then petitioner is entitled to a new trial because evidence of McCrane's Fifth Amendment plea was erroneously admitted as corroborating Preis' testimony.

On the present appeal, the government took the position that petitioner could have based his alleged prediction that McCrane would invoke the Fifth Amendment not on information communicated to him by his supposed co-conspirator, but on his knowledge as a lawyer and former Assistant United States Attorney and his knowledge of McCrane's personality and activities. Indeed, the government has urged petitioner could simply have been making his statement without any knowledge or basis whatever solely to induce Preis to lie.

If, as McCrane swears, he never communicated with petitioner concerning the decision to claim his rights under the Fifth Amendment, if, in fact, Joseph McCrane's Fifth Amendment plea came as a result of the independent advice of his counsel, given *after* the alleged statement of petitioner to Preis, and if, as the government now claims, petitioner merely predicted on the basis of his estimate of McCrane's character—or on no basis at all—that McCrane would assert his privilege, then clearly evidence of the plea was improperly admitted. The only grounds upon which admission of that evidence was sustained was that the evidence made it more likely than not that petitioner actually did predict it to Preis. Thus, the government's position that petitioner may well have had no advance knowledge whatever of McCrane's plea, divests evidence of the plea of all probative value.

Since the basis for its admission fails, inquiry must be made whether admission of the plea was prejudicial or harmful constitutional error such that justice requires a new trial. There can be no doubt that the admission in evidence that the fact that petitioner's co-conspirator, when questioned before the grand jury concerning the central aspects of the government's case against petitioner, claimed his Fifth Amendment right not to testify was prejudicial to petitioner in the highest degree. First of all, there is the danger that the jury may have treated the alleged co-conspirator's plea was the equivalent to the same plea by petitioner, in violation of *Grunewald* v. *United States,* 353 U.S. 391 (1957). It is respectfully submitted that this Court's decision in *United States* v. *Hale,* 422 U.S. 171 (1975), although decided in a different context, sets the applicable standard for the use of constitutionally protected silence as evidence. Recognizing the vast danger of permitting jurors to hear that a defendant [or, in the present case, his alleged co-conspirator] had exercised his constitutional right to remain

silent, this Court reversed a conviction obtained when the defendant was impeached by his previous silence.

> Not only is evidence of silence at the time of arrest generally not very probative of a defendant's credibility, but it also has a significant potential for prejudice. The danger is that the jury is likely to assign much more weight to the defendant's previous silence than is warranted. And permitting the defendant to explain the reasons for his silence is unlikely to overcome the strong negative inference that the jury is likely to draw from the fact that the defendant remained silent at the time of his arrest.

United States v. *Hale, supra,* 422 U.S. at 180

Secondly, the jury might have improperly concluded that petitioner had orchestrated that plea. Intelligent jurors, having been informed by the court that the "corroborating" refusal of McCrane to testify before the grand jury was admitted into evidence in regard to the conspiracy to obstruct the grand jury and that petitioner was responsible for the acts of his co-conspirators, could hardly have concluded merely, as they were permitted to do, that Preis testified truly when he said that petitioner had said he was aware of McCrane's intended plea, without concluding as well that petitioner was in fact responsible for that plea.

It is dubious that the judge's cautionary instructions could have cured the prejudicial effect necessarily generated by admission of evidence of the plea. According to the general law charged by the judge, a claim of privilege by a co-conspirator would be as much petitioner's plea as if he had made it himself. Certainly petitioner's own invocation of the Fifth Amendment could not be admitted against him even if accompanied by an instruction functionally equivalent to those given in this case. *Grunewald* v. *United States,* 353 U.S. 391, 421-424 (1957). Under the circumstances of this case, this Court's holding in *Bruton* v. *United States,* 391 U.S. 123 (1968), that limiting instructions could not cure the introduction at the joint trial of two defendants of one defendant's confession which incriminated the other, should apply equally when one co-conspirator's Fifth Amendment plea is offered against the other.[1]

Moreover, even assuming that the instructions of the trial court were sufficiently clear to inform the jury that they were to disregard the fact that McCrane's Fifth Amendment plea was that of an alleged co-conspirator of petitioner, the fact that the plea of privilege concerned the very substance of the tax avoidance conspiracy even as it allegedly furthered the concealment conspiracy makes it difficult to believe that the jury could have disregarded the—to a layman—obvious implication of the co-conspirator's pleading "the Fifth" about the Writers Associates-Stop and Save transaction. Certainly the court of appeals could cite no authority whatever for the proposition that the limiting instructions actually given would be sufficient to cure such use of a co-conspirator's Fifth

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[1] Apparently even the United States Attorney, no mere layman, was unable to follow the court's limiting instruction concerning the McCrane plea, and argued to the jury with respect to that plea that it might

> ". . . find *as part of the conspiracy* or . . . to corroborate Mr. Preis' testimony, Joseph McCrane took the Fifth Amendment in the United States grand jury.[3] And that is what induced Mr. Preis to come down to lie.

(Tr. 4802 (Emphasis added)).

Amendment plea. And it totally disregarded the well-reasoned opinions of the Pennsylvania Supreme Court in *Commonwealth* v. *Terenda,* 451 Pa. 116 (1973), and *Commonwealth* v. *DuVal,* 453 Pa. 205 (1973), forbidding the prosecution to put a co-defendant's plea of privilege before the jury and holding that instructions cannot cure such an action, just as it disregarded the decision of the court of appeals in *SanFratello* v. *United States,* 340 F.2d 560 (5th Cir. 1965), that the government cannot constitutionally place before the jury defendant's wife's claim of the Fifth Amendment privilege, *Kinser* v. *Cooper,* 413 F.2d 730 (6th Cir. 1969), that comment on the failure of a co-defendant to testify at a joint trial implicated the defendant and was, therefore, constitutionally impermissible, and *Scott* v. *Perini,* 439 F.2d 1066 (6th Cir. 1971), to the same effect. And in the *San-Fratello* case, at least, the trial court had charged fully and firmly that the claim of privilege by the defendant's wife could be in no way used to incriminate any other defendant in the case (340 F.2d at 564-65), yet the court of appeals held that instruction no cure. When, as here, there is no controlling opinion directly on point, the court of appeals certainly had a duty to distinguish such persuasive authority if it did not have to follow it.

The admission of McCrane's invocation of the Fifth Amendment also gives rise to constitutional problems in that it was introduced in a manner calculated to destroy petitioner's right under the Sixth Amendment to cross-examine the witnesses against him. McCrane was awaiting trial on related charges at the time petitioner was tried and was unavailable to petitioner as a witness. Yet his unexplained and unexamined testimony before the grand jury was used against petitioner as much as if that testimony had been the subject of prior cross-examination by counsel for petitioner. Moreover, it was introduced in

the way best calculated to prejudice petitioner. Petitioner's counsel, while preserving his objection to any use of the grand jury testimony whatever, agreed to stipulate that "McCrane was called pursuant to this investigation and he declined to testify." Instead, the grand jury stenographer was called and permitted to read questions relating to both Stop and Save, the company involved in the present case, and numerous other companies with which McCrane may have been involved but petitioner certainly was not. The reading of the transcript of McCrane's examination including McCrane's repeated refusals to respond conveyed the unmistakeable inference of petitioner's guilt, which inference petitioner had no opportunity to allay. The denial of the right to confrontation and effective cross-examination magnified the incriminatory effect of this so-called corroborative evidence upon petitioner and is harmful constitutional error. *Pointer* v. *Texas,* 380 U.S. 400, 405 (1965).

In summary, then, the panel of the court of appeals which heard the direct appeal held that the corroborative value of the testimony, given the limiting instructions of the court below, outweighed both the prejudicial effect of the evidence of a co-conspirator's Fifth Amendment plea with respect to the very center of the alleged conspiracy and the effect of denying petitioner his Sixth Amendment right of confrontation. But, when the McCrane affidavit established that his Fifth Amendment plea did not corroborate Preis' testimony, and when the government itself conceded on appeal that it is immaterial whether petitioner had any reason to believe that McCrane would claim his Fifth Amendment plea, then the basis for its admissions failed and only its prejudicial and unconstitutional effects remained.

3. If McCrane's affidavit—which was not available at the time of petitioner's trial—does conflict with Preis' critical testimony that petitioner was aware that McCrane planned to invoke the Fifth Amendment, then petitioner is entitled to a new trial on grounds of after-acquired evidence.

On the second appeal, petitioner argued for a new trial because of the conflict between McCrane's sworn statement that he never told petitioner he would invoke the Fifth Amendment, and Preis' testimony that petitioner knew of McCrane's future plea even before McCrane, according to his affidavit, had discussed the matter with anyone. McCrane swore on February 25, 1975 eight months after petitioner's sentencing, that he was prepared to testify that:

> At no time prior to my assertion before the Grand Jury on April 27, 1973, of my right not to testify on Fifth Amendment grounds, did I ever tell Nelson Gross that I would assert such a plea. *Indeed, until April 21, 1973, well after Gross' purported statement to Preis, I had not discussed with my attorneys or anyone else what action I would take* if I were to be called before the Grand Jury. In fact, I was out of the country on a vacation when a Grand Jury subpoena was served upon my wife on April 6, 1973, and I did not return to the country so that I could discuss this matter with anyone until April 21, 1973.

(Affidavit of Joseph McCrane, p. 4 (emphasis added.))

The existence of newly-discovered testimony such as that contained in the McCrane affidavit has been held to justify the grant of a new trial not merely when the evidence is the recantation of a prosecuting witness, as in *United States* v. *Meyers,* 484 F.2d 113 (3d Cir. 1973), or the admission of a convicted co-defendant that he alone is responsible for the offensive as in *Newsom* v. *United States,* 311 F.2d 74 (5th Cir. 1962), and *Ledet* v. *United States,* 297 F.2d 737 (5th Cir. 1962), in order to confirm the testimony of the defendant, but in cases when an independent witness not known or available to the defendant at the time of trial becomes available to corroborate the defendant's testimony thereafter, *Amos* v. *United States,* 218 F.2d 44 (D.C. Cir. 1954).

Where, as here, the evidence of the witness McCrane became available only after the trial and appeal from petitioner's conviction, assuming that that affidavit does not render totally invalid the government's theory that the McCrane Fifth Amendment plea corroborated Preis' testimony, that newly available evidence justifies at the very least a new trial at which a jury can evaluate the credibility of the witnesses McCrane and Preis.

A test for whether after-discovered evidence requires the grant of a new trial was not set forth in the Third Circuit in *United States* v. *Meyers,* 484 F.2d 113, 116 (3d Cir. 1973):

1. The evidence must have been discovered after the trial;
2. The failure to learn of the evidence must not have been caused by defendant's lack of diligence;
3. The new evidence must not be merely cumulative or impeaching;
4. It must be material to the principal issues involved; and
5. It must be of such a nature that in a new trial it would probably produce an acquittal.

Just as the *Meyers* court found a new trial necessary in that case, the same test would require a new trial in this. The first two prerequisites are obviously met by virtue of the fact that the testimony was only recently made available to petitioner.

The evidence being offered not only impeaches Preis' testimony, but also directly contradicts the use to which McCrane's Fifth Amendment plea was put—one of the principal issues involved in the case. The revelation that McCrane's Fifth Amendment plea was in no way the fruit of a conspiracy with petitioner and that his decision to claim his privilege before the grand jury turned entirely upon he advice of his counsel does away with any corroborative value that plea could conceivably have had. And that plea was made absolutely central to the government's case. As the United States Attorney stated, "That proof, your Honor, goes to the very gut and the heart of the conspiracy that is before this jury." (Tr. 2760) Indeed, although the court charged only that the plea was corroborative evidence, the United States Attorney went further and told the jury it might find that McCrane's plea was evidence of the conspiracy (Tr. 4802). When his alleged co-conspirator's plea of privilege is given such stress by the prosecution, the availability of a full explanation of the reasons for that Fifth Amendment plea, an explanation which fully exculpates petitioner, should certainly be permitted.

The defense likewise considered the plea of tremendous significance. No piece of evidence at the trial of petitioner—with the possible exception of the prosecutor abused filing under the Corrupt Practice Act—provoked so violent an objection by petitioner at trial, on appeal, and in his first petition for certiorari, as the testimony that Joseph McCrane has asserted his Fifth Amendment

privilege when questioned before the grand jury concerning the transaction between Writers Associates and Stop and Save Corporation which was the substance of tax avoidance counts of petitioner's indictment. Petitioner chiefly objected that the evidence was inherently prejudicial and, especially in light of the prosecutor's remarks, was likely to be used by the jury as proof of the concealment conspiracy.

By admitting evidence of the plea, the court implicitly stated that its corroborative value outweighed the obvious danger of unduly prejudicing petitioner before the jury. Now McCrane can testify that the jury should attach no corroborative value to his plea because at the time when petitioner supposedly stated so positively to Preis that McCrane would invoke the Fifth Amendment, neither petitioner nor McCrane knew that he would do so.

Under these circumstances, if the government's case against petitioner does not fail because the McCrane plea was improperly held to have corroborated the testimony of the witness Preis, then it must fail because that vital testimony concerning the government's most vital witness can now be shown to be untrue. Either way, the government's case simply cannot stand.

CONCLUSION

For the reasons hereinbefore set forth, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: June 10, 1976.

APPENDIX

Opinion of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 74-1697

UNITED STATES OF AMERICA

v.

NELSON G. GROSS,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

(D.C. Crim. No. 324-73)

Argued December 10, 1974

Before: ALDISERT, ADAMS and HUNTER, *Circuit Judges.*

Opinion of the United States Court of Appeals for the Third Circuit

OPINION OF THE COURT

(Filed—February 19, 1975)

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Jonathan L. Goldstein
United States Attorney
John J. Barry
Richard S. Zackin
William T. Pizzi
Assistant United States Attorneys
Newark, New Jersey
Counsel for Appellee

ALDISERT, *Circuit Judge.*

Nelson G. Gross appeals from a final judgment of sentence following a jury verdict on a five-count indictment charging aiding and assisting the filing of a false and fraudulent tax return, obstruction of justice, subornation of perjury before a grand jury and two counts of conspiracy. 26 U.S.C. § 7206(2) and 18 U.S.C. §§ 1503, 1622, 371. Although appellant has presented thirteen issues for review, only certain merit discussion.

I.

Testimony was adduced at trial which, when taken in the light most favorable to the verdict winner, indicates

Opinion of the United States Court of Appeals for the Third Circuit

the following: In July, 1969, Gross had a number of discussions with William Preis, president of Stop & Save Trading Stamp Corporation, pertaining to a possible $25,000 company contribution to William Cahill's gubernatorial campaign. When Preis stated that the company could not pay that much in cash, Gross proposed an "easy solution". Gross stated that if Preis agreed to make a $5,000 contribution by check, Gross would arrange to furnish Stop & Save with a bill for services rendered. Gross told Preis that "since it would be passed through as an operating expense it would become tax deductible, and it would actually only cost you half as much". (T. 1911-12). Gross assured Preis that, if the transaction were discovered, the worst that would happen would be a disallowance of the deduction by the Internal Revenue Service. In September, 1969, pursuant to this arrangement, Preis disguised a $5,000 contribution to Cahill's campaign as a business expense, utilizing a fictitious invoice from Writers Associates.

In the winter of 1972-73, the United States Attorney's office began investigating political activities in Bergen County, New Jersey. A federal grand jury issued a subpoena to Stop & Save in March, 1973, requiring the corporation to produce all records relating to Writers Associates. Thereafter, Preis met with Gross and, displaying the invoice and the grand jury's subpoena, asked, "Where do we go from here?" (T. 1993). Gross responded that the invoice represented payment for services rendered relating to a certain demonstration against an anti-trading stamp bill which had been pending in the New Jersey Legislature. Preis then asked Gross, "Why don't I just plain tell them the facts as they are, that it was a plain con-

tribution?" (T. 1999). Gross replied, "You can't, because if you do at this late stage of the game, you will immediately be cited for conspiracy and for fraud." (*Ibid.*). Preis, accompanied by corporate counsel Leonard Wolfram, met with the United States Attorney and one of his assistants on April 12, 1973. When shown the invoice and asked what services had been rendered, Preis responded with the contrived story about the demonstration. The government prosecutors informed Preis that they did not believe him and invited him to "rethink the whole story, . . . get . . . good outside criminal counsel, . . . prepare to come back . . . and . . . appear before the Grand Jury . . . [and] be very careful to tell the truth . . . ." (T. 2001). Later that day Preis met Gross and recited the events that took place in the United States Attorney's office. In response to Preis' need for outside criminal counsel Gross said, "You don't have any need for outside criminal counsel because I am it . . . . Perjury is one of the hardest criminal cases there is to prosecute and to prove, because . . . one of the ingredients and requirements of a perjury charge is to have someone get up and face you, challenge you, and claim that your statement was an out and out lie, and there is just nobody who can do that . . . . The only ones that really know the story behind this is [sic] myself and Joe McCrane. And I happen to know that Joe McCrane is going to plead the Fifth when he comes up for his hearing, and certainly I'm not going to tell . . . . [S]o you have nothing to worry about for perjury. . . . They have no evidence of any kind. You have nothing to worry about. You can go right back and tell that same story, and you will get off absolutely free." (T. 2008-09).

On April 17, Preis appeared before the grand jury and testified that a Stop and Save check in payment of the Writers Associates' invoice represented payment to a group of women who demonstrated at the State Capitol in Trenton, New Jersey. Preis was later indicted for makfalse declarations before the grand jury, 18 U.S.C. § 1623.[1] On advice of new counsel, he pleaded guilty to the indictment, and received permission to go back to the grand jury and tell the truth about his and Gross' participation in the Cahill campaign. (T. 2021-31). The indictment against Gross followed.

II.

Count V of the inditcment charged Gross with "suborn[ing] . . . Preis to commit perjury, as that crime is defined in Section 1623 of Title 18," in violation of 18 U.S.C. § 1622.[2] Appellant attacks his conviction on this count on alternative grounds. He contends that Count V

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[1] *False declarations before grand jury or court*

(a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

[2] *Subornation of perjury*

Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined not more than $2,000 or imprisoned not more than five years, or both.

of the indictment must be dismissed because Congress has not made subornation to make a false declaration a crime. Alternatively, appellant takes the position that, if such subornation is a crime, the court erred in refusing to charge the time-honored "two-witness rule."

We begin our analysis with the recognition that there are distinctions between the crime of general federal perjury, 18 U.S.C. § 1621,[3] and the recently-created crime, "False declarations before grand jury or court", 18 U.S.C. § 1623.

One difference concerns "[t]he general rule in prosecutions for perjury [under § 1621] . . . that the uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the accused set forth in the indictment as perjury." *Hammer* v. *United States,* 271 U.S. 620, 626 (1926). *Weiler* v. *United States,* 323 U.S. 606, 610 (1945), reiterated the *Hammer* holding and reemphasized: "The rule has long prevailed, and no enact-

[3] *Perjury generally*

Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

ment in derogation of it has come to our attention. The absence of such legislation indicates that it is sound and has been found satisfactory in practice."[4]

Legislation did come forward, however, in the Organized Crime Control Act of 1970, of which 18 U.S.C. § 1623 is a part, Title IV, Section 401(a), October 15, 1970, 84 Stat. 932. The Act makes it a crime for one to knowingly make "any false material declaration" before any court or grand jury of the United States. Section 1623(e) specifically provides: "Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence."

The legislative history discloses: "This Title [Title IV, FALSE DECLARATIONS] is intended to facilitate Federal perjury prosecutions and establishes a new false declaration provision applicable in Federal grand jury and court proceedings. It abandons the so-called two-witness and direct evidence rule in such prosecutions and authorizes a conviction based on irreconcilably inconsistent declarations under oath. . . ." 1970 U.S. Code Cong. & Ad. News 4007, 4008.

[4] It is clear from both *Hammer* and *Weiler* that the Supreme Court does not consider the evidentiary rule to be of constitutional dimension; the Court merely refused to depart from "[t]he special rule which . . . is deeply rooted in the past centuries" in the "absence of . . . legislation." *Weiler* v. *United States, supra,* 323 U.S. at 608-10.

Abolition of the "two-witness rule" for prosecutions under § 1623 is not the only distinction between the two statutes. As we noted in *United States* v. *Lardieri*, 497 F.2d 317, 320 (3d Cir. 1974), *rev'd in part on other grounds on rehearing before original panel*, — F.2d — (3d Cir. No. 73-1750, December 18, 1974), Congress chose to provide different *mens rea* elements: "Unlike the general perjury statute, § 1623 requires that a false statement be made 'knowingly,' rather than 'willfully.'" Also, in § 1623 Congress expressly limited the tribunals before which the oath is taken.

Realizing that the general perjury and false declaration statutes have certain differences, appellant would have us hold that, without perjury as defined in § 1621, there can be no subornation of "such jury" under § 1622. Brief at 30. We reject this unduly narrow interpretation of the subornation statute.

Section 1622 provides: "Whoever procures another to commit any perjury is guilty of subornation of perjury. . . ." The express language of this statute embraces the procuring of another to commit "any perjury," not just "such perjury as defined in § 1621." While it is clear that the perjury and false declaration statutes are not equivalents, it is equally clear that § 1623 is a species of perjury.[5] Indeed, as previously rehearsed, the intent of § 1623

[5] Congress neither amended § 1622 nor enacted a new subornation statute expressly proscribing subornation to make a false declaration when it enacted § 1623 in 1970.

was to "facilitate Federal *perjury* prosecutions." 1970 U.S. Code Cong. & Ad. News, *supra*, at 4008. Therefore, we hold that the words "any perjury" in § 1622 include the making of any false declaration under § 1623.[6]

Having disposed of appellant's statutory crime argument, we turn to his "two-witness rule"[7] contention. Appellant concedes, as he must, that Congress eliminated the

[6] The government believes that *Hammer* v. *United States*, *supra*, lays appellant's argument to rest. We disagree. *Hammer* held that the general federal perjury statute applies to federal bankruptcy proceedings. *Bronston* v. *United States*, 409 U.S. 352, 357 (1973). Unlike the case *sub judice*, the *Hammer* indictment did not specify whether the subornation charge was drawn under 29(b) of the Bankruptcy Act [now 18 U.S.C. § 152] or § 125 of the Criminal Code [now 18 U.S.C. § 1621]. However, the Court found the allegations of the indictment were sufficient to charge an offense under *either* the perjury statute or the Bankruptcy Act. Accordingly, the omission in the indictment was immaterial; the defendant was charged with "subornation of perjury." 271 U.S. at 625. Thus, the Court in *Hammer* had no occasion to, and did not, meet the precise issue before us.

[7] Wigmore traces the ancestry of the two-witness requirement to the "Romanesque law of Continental Europe." 7 J. Wigmore, EVIDENCE § 2032, at 241 (3d ed. 1940). "By the end of the 1600s it was decisively settled . . . that the ecclesiastical rules about numbers of witnesses were not to be adopted into the common law. It was after that time that there arose the single common-law exception to the doctrine that one witness alone may suffice in every case, namely, the rule that *one witness, without corroborating circumstances, does not suffice* on the charge of perjury. Yet even this rule was an indirect borrowing from the civil law." *Ibid.* § 2040, at 273.

two witness requirement for prosecutions under the false declaration statute, § 1623. However, he somehow believes that the crime of subornation of a false declaration, in violation of 18 U.S.C. § 1622, requires corroboration.

Had appellant been indicted for subornation to commit perjury under the general perjury statute, § 1621, his argument would have had force. An essential element of this crime is proof that perjury was committed; and "[t]he general rule in prosecutions for perjury is that the uncorroborated oath of one witness is not enough to establish the *falsity* of the testimony of the accused set forth in the indictment as perjury." *Hammer* v. *United States, supra,* 271 U.S. at 626 (emphasis added). "To hold to the [two-witness] rule in perjury and to deny its application in subornation cases would lead to unreasonable results." *Ibid.* at 628. Thus, *Hammer* held that the same rule of evidence must apply to both crimes—perjury and subornation of perjury.

But that is not this case. Here appellant was indicted for suborning Preis to make a false declaration before a grand jury. Section 1623 expressly abrogates the traditional "two-witness" rule.[8] To deny this rule's application in § 1623 prosecutions and to require its application in false declaration, subornation prosecutions would undeniably lead to unreasonable results. Using the words of the Court in *Hammer*: "Obviously the same rule of evidence in respect to establishing the falsity of the matter alleged as [a false declaration] must apply to both." 271 U.S. at 628.

[8] Congressional action in 1970 may be contrasted with the action of the 1911 joint Parliamentary Committee in England. Looking to a codification of English criminal law, the English Committee recommended, and Parliament passed, the Perjury Act of 1911, prohibiting convictions "solely upon the evidence of one witness as to the falsity. . . ." *Weiler* v. *United States, supra,* 323 at 610 n.4.

III.

The grand jury did not name Anthony Statile as a co-conspirator in Count I, nor did it name either Statile or Joseph McCrane as a co-conspirator in Count III. It did name McCrane as an unindicted co-conspirator in Count I. Both counts did recite that appellant and the named co-conspirators had conspired with each other "and with others."

On February 5, 1974, the government informed appellant by letter that it might offer proof that Statile was a Counts I and III co-conspirator. A letter dated February 21 notified appellant that McCrane similarly might be linked as a co-conspirator under Count III.

Selection of the jury commenced on February 26. Two and one-half days later, immediately after completion of the selection, appellant moved to require the government to disclose if in fact it was going to name Statile and McCrane as co-conspirators. After receiving an affirmative oral response from the government, appellant argued that (1) the addition of the names constituted a fatally improper amendment to the indictment and that (2) he was not accorded sufficient time to prepare his defense The district court rejected these arguments. Appellant reasserts them before us.

We do not write on a clear slate on the issue of amendment or variance of an indictment. *United States* v. *Radowitz*, — F.2d — (3d Cir., No. 74-1235, December 18, 1974); *United States* v. *Goldstein*, 502 F.2d 526 (3d Cir. 1974) (in banc); *United States* v. *Somers*, 496 F.2d 723 (3d Cir.), *cert. denied*, 43 U.S.L.W. 3208 (U.S. Oct. 9, 1974); *United States* v. *De Cavalcante*, 440 F.2d 1264 (3d Cir. 1971). We have previously reviewed the various functions of an indictment, *United States* v. *Goldstein, supra*, and have held that the precise inquiry is whether the change in the indictment is substantial or material, and not merely one of form. *Ibid.* at 528. We conclude that the addition of Statile and McCrane "did not so change the basic theory of the alleged conspiratorial agreement as to constitute an amendment to the indictment." *United States* v. *De Cavalcante, supra*, 440 F.2d at 1272 (footnote omitted).

Appellant's claim of insufficient time to prepare his defense must be tested in terms of actual or potential prejudice.

We now dispose of the contention relating to the addition of McCrane's name. He was inexorably intertwined with the specific allegations of the Count I conspiracy and with the government's theory of the subornation charge.

Specifically, appellant asserts that the addition of McCrane as a Count III co-conspirator enabled the government to get into evidence the fact that McCrane had exercised his Fifth Amendment right before the grand jury. The court, in the proper exercise of its discretion, admitted the evidence, with the appropriate cautionary instructions, for the specific and limited purpose of corroborating Preis' unobjected to testimony that Gross had said: "And I happen to know that Joe McCrane is going to plead the Fifth when he comes up for his hearing. . . ." (T. 2009, 2632, 2779-81, 2863-64). Because the court did not admit this evidence under the co-conspirator's exception to the hearsay rule, we fail to see how this prejudiced appellant.[9]

Without alleging any specific prejudice from the addition of Statile, appellant contends that he was somehow hamstrung in preparing his case for trial. Statile succeeded Gross as Republican Chairman of Bergen County. Jack Slavitt, a Newark lawyer, was solicited in 1970, along with others, to pay outstanding bills of appellant's campaign. He agreed to make a contribution in the amount of $1,000. Subsequently, he received a Mailmar invoice in the amount of $1,015. Mailmar was a printing company. Accompanying the invoice was a letter from Statile requesting Slavitt to send his check, which was made payable to Mailmar, directly to him at "GOP headquarters." (T. 1027). It is in the Slavitt situation that Statile's participation really surfaces. The government offered this

[9] We also do not believe that the court abused its discretion when it permitted the government to read into evidence the excerpt of the grand jury transcript showing that McCrane pleaded the Fifth Amendment when asked about his possible role in the issuance of "false and fictitious invoices". Because of the brevity of the excerpt introduced, because the question complained of merely provided the context in which McCrane pleaded the Fifth, and because the question made no reference to Gross himself, we do not believe that the reading of the excerpt was "inflammatory" or "prejudicial".

testimony to connect co-conspirators, Statile and Gross, with the use of Mailmar to mask political contributions.

We have some difficulty in perceiving the exact thrust of appellant's argument. We do not believe that he has demonstrated, by brief or at oral argument, how the addition of Statile as a co-conspirator altered the reception of this or other evidence referring to Statile's participation.

Appellant received informal notice of the possible addition of Statile three weeks before trial. No motion was made by appellant before the jury was selected to determine whether the government definitely intended to add Statile. After it was determined that Statile was to be added, appellant made no motion for a continuance. *See United States* v. *Somers, supra,* 496 F.2d at 746. Slavitt's testimony describing Statile's participation was completed on March 4; appellant did not open his defense until ten days later. *Cf. ibid.*

We conclude, therefore, that appellant did have time to react to Statile's addition and that the preparation of his defense was not adversely affected thereby.

IV.

Appellant argues that the trial court abused its discretion in permitting him to be cross-examined as to his income and as to certain financial statements he had filed. We find no abuse. The government's case was built largely on the testimony of Preis, President of Stop & Save, corporate counsel Leonard Wolfram and the wealthy in-

dustrialist Bernard Striar.[10] It was one of the pillars of the Gross defense, from the opening statement to the summation, that Gross was an insignificant person, and that these powerful men could not have been influenced by him. Thus, in the opening statement of the defense, the jury was told:

> The Gross firm was only little counsel. Nelson Gross was not a mastermind here. He was a private in William Preis' army.
>
> • • •
>
> He [Gross] was only one in the Preis army of trying to convince legislators that it really isn't a good thing for the State of New Jersey to pass legislation which will seriously affect trading stamps.

(T. 748, 752-53).

In the government's case, Preis and Wolfram were cross-examined by Gross' counsel about their salaries, deferred income, life insurance benefits, executive incentive bonuses and stock option plans. By cross-examination, appellant developed that Grand Union, the parent company of Stop & Save, had a net worth of millions and annual sales of more than a billion dollars. Striar was also cross-examined about his finances and his company's profits.

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[10] Striar testified that during a July, 1970, meeting with Slavitt and appellant, he decided to make a $2,000 contribution to appellant's 1970 senatorial campaign. He and appellant discussed the possibility of masking it as a business expense. Gross then said, "[T]his could be taken care of by Mailmar." (T. 793). Shortly after this meeting Striar's New York office received a Mailmar invoice in the amount of $2,000, which was duly paid but not charged to Striar's personal account.

During the summation of the defense, the jury was told:

> I say to you that William Preis, the Number 3 man in this million dollar corporate complex of Grand Union, the man who by his own testimony built this Triple S blue stamp operation up from nothing in 25 years to where it is today, is the man who by his own testimony was the general in the operation to combat and stamp out legislation wherever it might crop up that would vitally affect his business.
>
> • • •
>
> It defies common sense, and it's an insult to your intelligence for him to say to you that in this one sphere he deferred to Nelson Gross who concocted the idea in 1969 of a phony campaign contribution and in 1973 directed him and counseled him to lie to Mr. Goldstein and the Grand Jury.

(T. 4532-33).

It is the government's position, and we agree with it, that once the juxtaposition of financial net worths was introduced in the case, it was proper for the government to elicit testimony from Gross seeking to demonstrate that he was not so financially insignificant as he purported to be. (*See* T. 4126-28).

Upholding comparable trial strategies, this court, in *United States* v. *Lowe,* 234 F.2d 919, 922 (3d Cir.), *cert. denied,* 352 U.S. 838 (1956) (footnote omitted), speaking through Judge Goodrich, added an appropriate literary

touch: "When a party opens up a subject, even though it may not be strictly relevant to the case, he cannot complain on appeal if the other side gives him a Rowland for his Oliver." [11]

Tangential to this issue is appellant's contention that it was plain error for the court to permit the government to cross-examine him concerning his sworn statement of receipts and expenditures filed as a 1970 candidate for the United States Senate. This statement was required by the Federal Corrupt Practices Act, 2 U.S.C. § 241 *et seq.*[12] Gross argues that an issue of possible violation of this act was placed before the jury on cross-examination, albeit without a timely objection being raised. The government justifies its use as a means to impeach appellant's credibility.

Gross testified on direct that he had never heard of the Mailmar Printing Company through the time of the November, 1970 election. In the Corrupt Practices Act statement, Mailmar was listed as one of the firms for which he, in October, 1970, expended funds for his campaign. This

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[11] The government later represented that it was using appellant's 1968-72 income tax returns to tie appellant's income, largely derived from his firm's representation of sewerage authorities, with his political position. (T. 4139). Appellant's counsel objected to such use but frankly admitted that Gross had already so testified. (*Ibid.*). Indeed, the court cautioned the jury that "[t]here is no impropriety involved." (T. 4148). In light of these facts, we find no abuse here.

[12] Repealed and superseded by Federal Election Campaigns Act, 2 U.S.C. § 431 *et seq.* Act of Feb. 7, 1972, Pub. L. 92-225.

was fair game for the jury on the issue of credibility.[13] Indeed, had there been a timely objection to this particular use of the statement, we believe that the court would have properly exercised its discretion if it had admitted it. As to this issue the probative value of the testimony outweighed any accompanying prejudice.

We are less certain of the purpose and propriety of using the statement as a foundation for the questions concerning the amount of monies received during the campaign from various sources, the number of additional campaign accounts that Gross had, and Gross' knowledge of expenditures by the various campaign accounts in his behalf. These questions surrounded the Mailmar inquiry. Because we are of the view that the use of the statement as to Mailmar would have been a proper exercise of discretion, we do not believe that these few additional questions, in the absence of a timely objection, were so prejudicial as to require a new trial.

Appellant argues that the Assistant United States Attorney went far beyond the bounds of permissible closing argument and disclosed the real purpose of admitting the sworn statement—that appellant violated the Federal Corrupt Practices Act. The prosecutor said:

> Why do we bring out the conflict—the senatorial campaign statement? Because it is eloquent testimony to the way this defendant views the laws of the United States.

(T. 4826). Immediately following this question and representation, the prosecutor went on to say:

> It is eloquent testimony to what he considers on oath to be, and the oath I'm going to read you concerns just the expenditures because that really is the important part of this document.
>
> • • •
>
> The important part of this document that was sworn to, signed and subscribed to, read, as he himself told you, and read carefully, was, Number 1, Mailmar. He denied ever knowing Mailmar.

(T. 4826-27).

Referring to an unreported campaign contribution by appellant's law partnership, the Assistant United States Attorney added:

> That was a direct contribution that had to be reported under the laws of the United States, even then.

(T. 4827). Shortly afterward, in referring to appellant's statement on cross-examination that he had "avoided" the Corrupt Practices Act, the Assistant United States Attorney concluded:

> Nelson Gross, to sum it up in his own words, avoids the law, he violates the law, he is guilty of the crime charged beyond any reasonable doubt in this case.

(T. 4828-29).

[13] The government also argues that it utilized the statement to refute the Gross-created impression that he was naive when it came to campaign financing. We have reviewed the record in this light and do not believe that the statement was used for this purpose.

These remarks seem to us to go beyond merely attacking appellant's credibility through comment on how he viewed an oath, and appear to constitute an argument that appellant's alleged violation of the Corrupt Practices Act was a matter which the jury could consider in determining the guilt or innocence on the crimes charged. The last statement quoted above is particularly troublesome, because it seems to twist Gross' statement that he "avoided" the Act into an admission that he had violated it,[14] and to make further implication that he is therefore guilty of the crime charged.

Defense counsel failed to object at the time these statements were made; consequently, we can reverse only if the statements constituted plain error. *United States* v. *Somers, supra,* 496 F.2d at 742. We have concluded that they did not constitute plain error. Nevertheless, we unhesitatingly reaffirm Judge Garth's recent admonitions in *United States* v. *Somers, supra.*

V.

The remaining contentions raised by appellant may be discussed more briefly. We find no error in the trial judge's charge that Grand Union Company had made no

[14] When Gross was asked whether the Act was "violated", he specifically denied that it had been and stated instead that it was "avoided". (T. 4093). Gross testified and his counsel argued that it was not a violation of the Act to fail to report contributions filed by local committees operating solely within one state (T. 4091, 4105-06), and the trial judge so charged the jury. (T. 4894).

attempt to deceive the IRS concerning other campaign contributions. It is apparent from the context of that portion of the charge that the trial judge was referring to attempts to deceive the Internal Revenue Service by the use of a false invoice, and there was, in fact, no evidence that false invoices were employed to disguise those other contributions. Furthermore, we agree with the government that Preis' possible role in deducting the other contributions was not really relevant, since it was clear that Preis used someone from outside Grand Union to obtain a Writers Associates invoice to make possible the deduction of the $5,000 contribution at issue. The only real dispute at trial was whether that outside person was Gross or someone else.

Little more need be added. We reject appellant's contention that his conviction must be set aside because of the prosecution's alleged knowing reliance on perjured testimony. Appellant's characterization of Wolfram's testimony as "perjured" is nothing more than a characterization, and there is no evidence to show that the government knew that Wolfram's testimony was inaccurate or "substantially misleading". *Cf. United States* v. *Harris,* 498 F.2d 1164, 1169 (3d Cir. 1974). As to further allegations of prosecutorial misconduct, we accept the exhaustive analysis of Judge Whipple in his opinion denying a new trial. 375 F. Supp. 971 (D. N.J. 1974). We have reviewed the testimony and are satisfied that there was sufficient evidence to support the convictions.[15] We have

[15] Appellant's numerous contentions challenging the sufficiency of the evidence relate merely to the credibility of Preis and Wolfram, which we cannot evaluate for ourselves on appeal. Where the jury has returned a verdict of guilty, an appellate court is bound to accept the evidence in the light most favorable to the prosecution. *See United States* v. *De Cavalcante, supra.*

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considered the other contentions raised by appellant and find them devoid of merit.[16]

The judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

[16] Other contentions are: the admission of co-conspiratorial hearsay was in error and the charge to the jury compounded the error; the court's lack of an evenhanded policy during discovery violated substantial and constitutional rights of the defendant; the defendant was deprived of his constitutional right to a fair and impartial jury; the indictment should have been dismissed on the ground of selecitve prosecution and discovery should have been permitted with respect thereto; direct political contributions are deductible for tax purposes as ordinary and necessary business expenses, and therefore the indictment should have been dismissed or at least discovery permitted with respect thereto.

Judgment of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 74-1697

UNITED STATES OF AMERICA

vs.

NELSON G. GROSS,

Appellant.

(D.C. Criminal No. 324-73)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE —— DISTRICT OF NEW JERSEY

Present: ALDISERT, ADAMS and HUNTER, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the —— District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered June 18, 1974, be, and the same is hereby affirmed.

ATTEST:

THOMAS QUINN
Clerk

February 19, 1975

Order Denying Petition for Panel Rehearing

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 74-1697

UNITED STATES OF AMERICA

v.

NELSON G. GROSS,

Appellant.

Present: ALDISERT, ADAMS and HUNTER, *Circuit Judges.*

SUR PETITION FOR PANEL REHEARING

The petition for panel rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and no judge who concurred in the decision having asked for rehearing, the petition for panel rehearing is denied.

1. Points 1 and 3-8 of Appellant's petition for rehearing were carefully considered by the Court and found to be without merit.

2. Points 2, 9 and 10 of Appellant's petition for rehearing (concerning the availability of McCrane and new evidence revealed at his two trials) are more properly matters to be brought to the attention of the trial court in a motion under F. R. Cr. P. 33.

3. We express no opinion on the merits of points 2, 9 and 10.

BY THE COURT,

ADAMS
Circuit Judge

Dated: April 2, 1975

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 74-1697

UNITED STATES OF AMERICA

v.

NELSON G. GROSS,

Appellant.

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, and VAN DUSEN, ALDISERT, ADAMS, ROSENN, HUNTER and WEIS, *Circuit Judges.*

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

ALDISERT
Judge

Dated: April 2, 1975

• Judges Gibbons & Garth did not participate in the decision of this matter.

Opinion of the United States District Court for the District of New Jersey

UNITED STATES OF AMERICA

v.

NELSON G. GROSS,

Defendant.

Crim. A. No. 324-73.

UNITED STATES DISTRICT COURT,
D. NEW JERSEY.

May 15, 1974.

Jonathan L. Goldstein, U. S. Atty., and *Richard D. Shapiro*, Asst. U. S. Atty., for the United States.

Hannoch, Weisman, Stern & Besser, by *Albert G. Besser*, and *Ronald M. Sturtz*, Newark, N. J., for defendant.

OPINION AND ORDER

WHIPPLE, District Judge:

The defendant Nelson Gross moves this Court for a judgment of acquittal pursuant to Fed.R.Crim.P. 29(c) alleging that the evidence presented in the case was insufficient to sustain his conviction for the offenses charged in the indictment or in the alternative, the defendant moves this Court for a new trial in the interests of justice pursuant to Fed.R.Crim.P. 33.

Opinion of the United States District Court for the District of New Jersey

[1] In ruling on a motion for a judgment of acquittal the test that ought to be applied by the trial judge is that laid down by Judge Prettyman in Curley v. United States, 81 U.S.App.D.C. 389, 160 F.2d 229 (1947):

> . . . a trial judge, in passing upon a motion for a directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt, the motion must be granted. If he concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter. *Id.* 232-233.

In the instant matter, the jury has decided upon the defendant's guilt to what it believed to be beyond a reasonable doubt. The renewal of the defendant's motion for acquittal now is premised on his belief that the jury could not have reached this conclusion rationally on the state of the evidence presented in the case and for this reason the jury's verdict must be overturned, as against the weight of the evidence and as a product of passion and prejudice demanding that a judgment of acquittal be now entered for the defendant.

[2-4] In deciding whether the reasonable juror would have had to have a reasonable doubt concerning the defendant's guilt, the trial court must view the evidence in a light most favorable to the government and give it the benefit of all legitimate inferences. United States v. Hopkins, 354 F.Supp. 634 (E.D.Pa. 1973); Powell v. United States, 135 U.S.App.D.C. 254, 418 F.2d 470 (1969). In the instant case, the defendant bases his motion for a judgment of acquittal on the incredibility of the government's chief witnesses, Leonard Wolfram and William H. Preis, which the defendant believes was established by the thorough cross-examination of Wolfram and by the direct examination of Wolfram's secretary, Ruth Smith, and the Stop and Save Comptroller, Urinyi. In my review of this testimony, I do not consider it inconceivable nor highly improbable that the jury could have rationally believed the testimony of Preis and Wolfram. Further, it is not within the Court's power when ruling on a judgment of acquittal to assess the credibility of the government's witnesses. Its function on this motion is to ponder probabilities, not to reach actual conclusions; the final decision concerning the believability of the government's witnesses rests with the jury. United States v. Allard, 240 F.2d 840 (3rd Cir. 1957); United States v. Morris, 308 F.Supp. 1348 (E.D.Pa. 1970). What the Court does in ruling on the judgment of acquittal is to decide whether a rational juror could find on the state of the evidence that the defendant was guilty beyond a reasonable doubt. This the jury has done and I cannot find its conclusion irrational.

[5] The credibility of witnesses comes within the purview of the trial court however, when it rules on the motion for a new trial after the jury has rendered its verdict. At that time, it is incumbent on the Court to evaluate and weigh the evidence in order to decide whether the jury's verdict is against the weight of the evidence and whether a miscarriage of justice has occurred. This motion is directed to the conscience of the Court and it must set the jury's verdict aside, when in its review of the facts, the conviction is contrary to the weight of the evidence. United States v. Wilson, 178 F.Supp. 881 (D.D.C.1959).

[6] The jury's verdict, however, is entitled to presumptive validity and the trial court should exercise its authority in this area very sparingly and only in the most exceptional cases when it is convinced that a gross injustice will have been done if it fails to act. United States v. Provenzano, 240 F.Supp. 393 (D.N.J.1965) affirmed 353 F.2d 1011 (3rd Cir. 1965); United States v. Leach, 427 F.2d 1107 (1st Cir. 1970):

> Motions for new trial are directed to the trial court's discretion. Under its broad power, the court may weigh the evidence and consider the credibility of witnesses. The remedy is sparingly used, the courts usually couching their decisions in terms of "exceptional cases," United States v. Pepe, 209 F.Supp. 592, 595 (D.Del.1962), affirmed 339 F.2d 264 (3rd Cir. 1964), "Miscarriage of justice", United States v. Parelius, 83 F.Supp. 617, 618 (D.Haw.1949), and where "the evidence preponderates heavily against the verdict", United States v. Robinson, 71 F.Supp. 9, 10-11 (D.D.C.1947). . . . *Id.* 1111

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In reviewing the instant matter, the defendant directs the Court to ten alternative bases for the grant of a new trial. The defendant alleges: (1) that the United States attorney knowingy utilized the perjured testimony of Leonard Wolfram in his case in chief (2) that the Court's admission of Joseph McCrane's Fifth Amendment testimony before a Federal Grand Jury was so prejudicial that it rises to reversible error (3) that the Court erred in allowing the United States Attorney to elicit testimony concerning the defendant's economic status (4) that the Court erred in allowing testimony concerning defendant's compliance or failure thereof with the 1925 Federal Corrupt Practices Act, 2 U.S.C. § 241 et seq. (5) that the United States Attorney engaged in conduct throughout the course of the trial which necessitates prophylatic relief by way of granting the defendant a new trial (6) that the plan for petit jury selection in this District is unconstitutional in that it systematically excludes attorneys, public officials and other persons of economic means (7) that the Court erred in charging the jury to ignore the tax deductibility of certain items listed on Grand Union's Federal Tax Returns (8) that the verdict is clearly against the weight of the evidence (9) that the Court erred in admitting the hearsay testimony of Bernard Striar and Suzanne Phillips Miller concerning their respective conversations with co-conspirators Anthony Statile and Joseph McCrane and (10) that the Court erred in allowing the naming of Anthony Statile in Count I and Joseph McCrane in Count III of the indictment on the eve of trial. These ten bases for a new trial raised by the defendant may be grouped into four categories. The first of these concerns alleged errors committed by the Court in its rulings on evidence in the course of the

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trial (Nos. 2, 3, 4 and 9) in its charge to the jury at the close of the case (No. 7) and in its ruling on a pre-trial motion (No. 10). Category two consists of assisting the credibilty of Leonard Wolfram and whether his testimony, apparently believed by the jury, is so infirm as to characterize the jury's verdict as substantially contrary to the weight of the evidence (Nos. 1 and 8). Category three charges prosecutorial misconduct by the United States Attorney and his bad faith reliance on perjured testimony (Nos. 1 and 5). Finally, Category four alleges the unconstitutionality of this District's jury selection plan (No. 6).

[7] The issues raised in Category one of the defendant's motion essentially ask this Court to reconsider its rulings rendered during the course of the trial. The burden rests on the defendant to demonstrate that these previous rulings vitiated the essential fairness of his trial and resulted in a denial of due process. United States ex rel. Darcy v. Handy, 351 U.S. 454, 76 S.Ct. 965, 100 L.Ed. 1331 (1956). The defendant previously objected to these rulings when the issues were originally raised and this Court rejected the defendant's arguments then. At this juncture of the case, wherein the burden which the defendant must sustain is much heavier, he has advanced no new arguments and this Court must therefore reaffirm its previous rulings and deny defendant's motion for a new trial based on these grounds.

In Category two, the defendant properly requests this Court to assess the credibility of the government's witnesses and to determine whether the jury's verdict is contrary to the weight of the evidence. United States v. Zannino, 468 F.2d 1299 (1st Cir. 1972); United States v.

Joines, 327 F.Supp. 253 (D.Del.1971). The major thrust of defendant's motion is directed to the credibility of Leonard Wolfram. His demeanor on the witness stand and his responses to the expert cross examination by the defendant's counsel proved him to be a confused and befuddled witness. His memory was confined to the general sequence of events in February and April of 1973 and frequently failed to recall specific dates, specific documents, and the specific words of conversations. The defendant alleges that the witness had a memory of convenience which remembered only these events which would implicate the defendant in a plot to suborn the perjury of William H. Preis and failed to recollect any event which might indicate his own personal participation in this attempted subornation plot. This Court, however, does not go so far. Assuredly Leonard Wolfram was not a strong witness for the government, his lapses of memory and recall of detail, were a frustrating and faltering aspect of the government's case. His testimony was severely neutralized by the defendant's cross examination.

Leonard Wolfram, however, was not the only government witness nor was he necessarily believed fully and confidently by the jury in order for it to justify its guilty verdict. The testimony of Bernard Striar and William Preis along with other government witnesses was sufficient to justify the jury's verdict and, for this reason, the defendant's motion for a new trial based on Category two must also be denied.

Appended to the defendant's attack on the testimony of Leonard Wolfram, there is a technical argument concerning the legal sufficiency of Count V of that indictment. Count V alleges that the defendant suborned the

perjury of William Preis before a United States Grand Jury as that perjury is described in 18 U.S.C. § 1623, i.e. that Preis knowingly made a false declaration before the Grand Jury.

[8] The offense which Preis committed is relatively new. It was enacted by Congress in 1970 in order to abrogate the so-called two witnesses rule in perjury prosecutions which demanded that the falsity of a perjured statement be established by the testimony of two independent witnesses. Weiler v. United States, 323 U.S. 606, 65 S.Ct. 548, 89 L.Ed. 495 (1945); United States v. Alu, 236 F.2d 179 (3rd Cir. 1956); United States v. Mc Ginnis, 344 F.Supp. 89 (S.D.Texas 1972); 1970 U.S.Code Cong. and Admin.News, p. 4007. Accordingly, this Court rejected defendant's requested charge at the close of the case which would have instructed the jury concerning the two witness rule.

The argument which defendant advances against Count V is relatively simple. He reasons that the subornation statute, 18 U.S.C. § 1622, is expressly directed only toward perjury as that crime is defined in 18 U.S.C. § 1621 and not toward the making of the false declaration described in 18 U.S.C. § 1623. As a result, the defendant claims he has been illegally found guilty of an offense which is not a statutory crime. In the alternative, the defendant contends that if the United States Attorney argues that it was clear to all concerned that the subornation charged in the indictment was of perjury pursuant to § 1621 and merely incorrectly stated as § 1623, then the Court erred in its charge to the jury and for this reason the defendant should be granted a new trial.

[9] This Court concludes that neither of the defendant's constructions or explanations for Count V of the indictment is correct. The subornation statute § 1622 reads: "Whoever procures another to commit any perjury is guilty of subornation of perjury." By utilizing the term "any" in its legislative language, Congress clearly intended the subornation statute to apply to all perjury which it might define and not to be restricted or limited in its application merely to the offense described in § 1621. It is also evident that since Congress did not attempt to amend the subornation statute in 1970 to include the subornation of a false declaration that it must have concluded that this offense was already defined in its prior enactment of § 1622 just as 18 U.S.C. § 2, the aiding and abetting statute applies to all substantive offenses of Title 18 whether they were enacted prior or subsequent to the statue. For this reason then, this Court concludes that 18 U.S.C. § 1622 defines the crime of suborning the making of a false declaration as well as the subornation of what was previously known as perjury.

[10] Category three of the defendant's motion alleges gross misconduct by the United States Attorney and, in particular, his knowing reliance on the perjured testimony of Leonard Wolfram. It should be emphatically noted at the outset that the perjured character of Leonard Wolfram's testimony is solely an allegation by the defendant and not an adjudicated matter.

The basis for defendant's allegation is that in the course of eleven lines of transcript, Leonard Wolfram testified to the details of a conversation he had with Nelson Gross in April of 1973. The defendant introduced evidence at trial which tended to demonstrate that the

conversation could not have occurred on the date Wolfram reported. The reason for this was that a topic of their conversation concerned a diary and an entry therein. It was established in the course of the trial that this diary could not have been presented to Gross at the time of this conversation because it was not known to exist until more than one week later. The defendant also contends that the United States Attorney was in a position to know the untruth of Wolfram's testimony at the time of his direct examination since the diary in question was discovered and produced only through the efforts and specific request of the United States Attorney's office. As a result, the defendant concludes that the United States Attorney acted in bad faith by introducing into evidence at the trial, testimony which he knew to be false and because of this prosecutorial misconduct, the defendant should be granted a new trial.

In reviewing this argument, the Court finds it apparent that what defendant nows sees to be the sequence of events in April of 1973 which makes the date and/or substance of Wolfram's reported conversation with Nelson Gross improbable is a product of information which was produced late in the trial in the course of the defendant's case by the testimony of the diary custodian, Mrs. Ruth Smith. It is not apparent to the Court that this same information or perspective on the events of April 1973 was known by the United States Attorney during his direct examination of Wolfram let alone at the outset of the trial. In fact, the United States Attorney in his summation conceded the improbability of the diary's having been presented to Gross at the time of the reported conversation. As to the testimony of Leonard

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Wolfram this Court has already had occasion to remark upon the weakness and contradictions inherent therein. Whatever may be the truth value of Wolfram's testimony, the issue here is whether the United States Attorney deliberately procured false testimony from a witness in his conduct of this trial. There are many unanswered questions raised in the trial of any case but the defendant has produced no telling evidence which would inculpate the United States Attorney of such a grievous misconduct as the defendant alleges here.

[11] The other instances of claimed prosecutorial misconduct which the defendant raises on this motion do not rise to the level of misconduct which this Circuit demands before a convicted defendant may be granted a new trial. As the Circuit has indicated, trials are "rarely, if ever perfect." United States v. Leftwich, 461 F.2d 586, 590 (3rd Cir. 1972) and errors or acts committed by counsel both for the government and defense, ". . . do not call for a new trial unless they are so gross as probably to prejudice the defendant and the prejudice has not been neutralized by the trial judge before submission of the case to the jury." *Id.* 590, cited also in United States v. Somers, 496 F.2d 723 (3rd Cir. 1974) cert. pending.

The defendant, citing *Somers, supra,* argues that the United States Attorney was guilty of prosecutorial misconduct and this deprived the defendant of a fair trial. I have carefully reviewed the records in this case and I have concluded that there was no prosecutorial misconduct.

In *Somers,* the Court of Appeals held certain remarks of the prosecutor in his opening statement to the jury

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were improper in that they constituted "overly dramatic unnecessary characterizations" of the defendants and their conduct. *Id.* 21-22 and n. 26 (Slip opinion filed March 27, 1974). The Court also found improper two additional comments of the United States Attorney wherein he indicated that he possessed information not in evidence which implicated the defendants. *Id.* 24-25.

In the present case, it should be noted that this was a long trial (five weeks) and hard fought by both sides. The jury heard the testimony of nine government witnesses and 20 defense witnesses, including the defendant himself.

There is nothing in the alleged improper remarks of the United States Attorney that can fairly be construed as a personal attack on the defendant, as comment on evidence outside the record implicating the defendant or as an opinion of the United States Attorney on the defendant's guilt. The defendant uses the phrase "prosecutorial misconduct" as a catchword to reargue the admissibility of certain evidence and the scope of cross-examination of defense witnesses. Falling into this category are such alleged improprieties as the introduction into evidence of Wolfram's "prejured" testimony, McCrane's Fifth Amendment plea before the Grand Jury and defendant's income tax returns and the cross-examination of the defendant and his witnesses concerning defendant's political career, law practice, partnership records and financial status. The areas which the United States Attorney attempted to explore on cross-examination were all "opened up" by defense counsel's direct examination. Since this Court permitted both the introduction of this evidence and this cross-examination,

the United States Attorney can hardly be accused of improper conduct.

In addition, defendant cites a number of instances where the United States Attorney allegedly made statements on evidence outside the record. It should be noted that the defendant's attorney in his cross-examination of government witnesses and the defendant in his own testimony attempted to place the United States Attorney's office on trial by insinuation and innuendo to the effect that the United States Attorney himself suborned perjury. On each occasion when this occurred through cross-examination of government witnesses, defense counsel had no bases in fact for his question. During the course of the defendant's cross-examination he purposely interjected news accounts relating to "warfare" between state and federal law enforcement offices and alleged "leaks" from the United States Attorney's office. On each occasion when this occurred, the defendant's answers were unresponsive to the question posed by the United States Attorney. It is obvious that the testimony pertaining to the unsupported charges of "leaks" and "warfare" between law enforcement offices was totally irrelevant to the guilt or innocence of this defendant on the charges set forth in the indictment.

[12] I recall, during the cross-examination of Bernard Striar, a government witnes, counsel for the defendant asked Striar without any basis in fact if it were true that an assistant United States Attorney had pointed out the defendant to Striar in the courtroom in order to assist the witness in his identification of the defendant. The United States Attorney thereupon objected and rightly so to the question and stated that his office did not engage in such conduct.

Taken in context, the United States Attorney's objection served only to neutralize what I consider to be an unfair question by defense counsel. Counsel then made the surprising suggestion in the jury's presence that the United States Attorney take the stand and testify to rebut the insinuation that he had done something which was tantamount to suborning perjury. The United States Attorney did not launch an attack upon the defendant, as was condemned in *Somers*, but merely defended his office by making which I consider to be proper objection. Defendant was in no way prejudiced by the remark.

[13] I reach the same conclusion as to the question posed by the United States Attorney concerning "leaks" from his office. Here the United States Attorney was provoked by an unresponsive answer of the defendant to the effect that there were "leaks" emanating from his office. Moreover, rather than objecting to the United States Attorney's questions, defense counsel insisted that his client answer them. The defendant appeared to be waiting for an opportunity to inject the issue of "leaks" into the trial.

Shortly thereafter, the defendant gave another unresponsive answer wherein he recalled reading newspaper accounts concerning a so-called war between the United States Attorney's office and the State Attorney General's office over the investigation of the Writer's Associate invoice. The United States Attorney attempted to cross-examine defendant concerning this alleged incident but was prohibited by this Court. However, I do not find anything stated by the United States Attorney which constituted misconduct in the sense of implicating the defendant or expressing an opinion as to guilt. Again I find that defendant was not prejudiced by the incident.

Defendant cites other instances of alleged prosecutorial misconduct. As to the United States Attorney's reference to "arson" during the cross-examination of the defense witness Albanese, I conclude there was no prejudice. I consider this Court's prompt cautionary instructions to be effective and sufficient to protect the defendant. I reach the same conclusion as to the partial question asked of Albert Gross: "Did there come a time when you were personally sued by trustees . . .?" Defense counsel interrupted the question with an objection. Again I consider my stern cautionary instructions sufficient to protect the defendant from any prejudice.

[14] Defendant cites several other alleged instances of prosecutorial misconduct. Many of these were not objected to at trial. Accordingly, the defendant cannot raise them on his post trial motion. See United States v. Somers, *supra* at 29-30; United States v. Lawson, 337 F.2d 800, 807 (3d Cir. 1969) cert. denied 380 U.S. 919, 85 S. Ct. 913, 13 L.Ed.2d 804 (1965). After carefully reviewing this record in its entirety, I conclude there was no "prosecutorial misconduct" and the defendant was not denied a fair trial. As a result defendant's motion for a new trial based on his third category of objections is also denied.

[15] Finally, the defendant raises what he considers to be a serious constitutional infirmity in this District's jury selection plan. He argues that the plan in effect in this District systematically excludes attorneys, public officials, professional or business persons and others of high income.

Whatever merit there may be in defendant's allegation a reading of the precedents available in this Circuit, as

well as in the United States Supreme Court, leads me to conclude that defendant's motion comes too late. Although the precedents that the Court will rely upon deal with the composition of Grand Juries, I consider these cases closely analogous both factually and legally. The selection of petit and grand juries is governed by a single statutory provision 28 U.S.C. § 1867 which requires all objection to the method of the jury's selection be raised prior to the voir dire, 28 U.S.C. § 1867 (a) and (e). As a result, the failure to raise a timely objection on these grounds has been held to constitute a waiver based on policy considerations underlying Fed.R.Crim.P. 12(b)(2), Davis v. United States, 411 U.S. 233, 93 S.Ct. 1577, 36 L.Ed.2d 216 (1973); United States v. Noah, 475 F.2d 688 (9th Cir. 1973); United States v. Zirpolo, 450 F.2d 424 (3rd Cir. 1971). That policy has alternatively been expressed as the need for an orderly process of criminal procedure with sanctions of forfeiture for those who seek to avoid the impact of procedural rules, Fay v. Noia, 372 U.S. 391, 432, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963) or finality in criminal judgments, Thornton v. United States, 125 U.S.App.D.C. 114, 368 F.2d 822 (1966). These formalistic considerations, however, have repeatedly been overturned when serious questions concerning the denial of constitutional rights have been asserted, Kaufman v. United States, 394 U.S. 217, 288, 89 S.Ct. 1068, 22 L.Ed. 2d 227 (1968); Sanders v. United States, 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963). As the Supreme Court said in *Sanders*: ". . . conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged." *Id.* p. 8, 89 S.Ct. p. 1073.

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These legitimate governmental interests in forfeiture and finality have added weight, however, when the convicted criminal defendant alleges unconstitutional composition of a jury in whose selection he actively and vigorously participated. To grant relief in this context would have the Court approve and participate in the defendant's trial tactics which involve the deliberate avoidance of Congressionally approved procedural requirements. If the Court consented to such a course of action, then for every defendant, "(S)trong tactical considerations would militate in favor of delaying the raising of the claim in hopes of an acquittal, with the thought that if those hopes did not materialize, the claim could be used to upset an otherwise valid conviction at a time . . .", Davis v. United States, 411 U.S. 233, 241, 93 S.Ct. 1577, 1582, 36 L.Ed.2d 216 (1972).

In the present case, this Court will not be a party to these tactics. The defendant here offers no plausible explanation for his failure to make timely objection to the composition of the jury. The method of selecting the jury panel has been utilized in this District since 1968 and it was implemented pursuant to the standards of 28 U.S.C. § 1861 et seq. No reason has been suggested why the defendant or his counsel could not have ascertained the information relative to his present objection prior to trial or, at least, in the course of the very thorough voir dire of each juror individually and in chambers by the Court with the defendant present as well as counsel for the government and the defense. This Court also does not perceive how prejudice to the defendant's right to a fair trial could have resulted from the jury which was actually selected. For these reasons, this Court denies defendant's

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motion for a new trial on the basis of his fourth category of objection and it also denies his application for an evidentiary hearing concerning the jury selection practice pursued in this District.

It is, therefore, ordered, this 15th day of May, 1974 that defendant's motion for a judgment of acquittal pursuant to Fed.R.Crim.P. 29(c) and in the alternative for a new trial pursuant to Fed.R.Crim.P. 33 be and the same are hereby denied.

Affidavit of Joseph M. McCrane, Jr.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 74-1697

UNITED STATES OF AMERICA,

v.

NELSON G. GROSS,

Appellant

JOSEPH M. MCCRANE, being duly sworn according to law, deposes and says:

1. That he was named by the Grand Jury as a co-conspirator with Nelson G. Gross in Count 1 of the indictment in United States v. Nelson G. Gross, Criminal Action No. 324-73 in the United States District Court for the District of New Jersey and that he was named as a co-conspirator with Gross by amendment of Count 3 of the same indictment. It is from Gross' conviction on that indictment that this appeal is taken.

2. That he was indicted as of Criminal Action No. 341-73 in the United States District Court for the District of New Jersey two days after Gross had been indicted as mentioned above. Gross was mentioned as a co-conspirator with him in Count 1 of this indictment, which in-

volved, in part, the same matters which were the subject of Gross' indictment.

3. That on April 27, 1973, before either of the above-mentioned indictments was returned by the Grand Jury, he was called before the Grand Jury and exercised his right under the Fifth Amendment not to testify.

4. That during the trial of Nelson Gross on the above-mentioned indictment, his attorney notified counsel for Gross and the government that he would exercise his Fifth Amendment right not to testify if he were called as a witness and, accordingly, that he did not testify in that case.

5. That on December 10, 1974, he was acquitted on Count 1 of the indictment against him, charging a conspiracy to "[d]efraud the United States by impeding, impairing, obstructing and defrauding the lawful governmental functions of the Internal Revenue Service of the Treasury Department of the United States in the ascertainment, computation, assessment and collection of revenue, to wit, income taxes . . .," essentially the same charge involved in Count 1 of the indictment against Gross and Count 5 charging him with aiding and assisting "The Grand Union Company and its includable subsidaries (including the Stop and Save Trading Stamp Corporation) to prepare and present to the District Director of Internal Revenue . . ." a false and fraudulent corporate income tax return, essentially the charge contained in Count 2 of the indictment against Gross.

6. That, having read the testimony of Preis and the summation of United States Attorney Jonathan Goldstein

at the trial of Nelson Gross, he knows that the verdict was based, at least in part, on incorrect testimony.

7. That, having been acquitted of the charges against him involved in the case against Nelson Gross, he has been advised by his counsel that there is no longer any basis or reason for him to assert his Fifth Amendment right not to testify on behalf of Nelson Gross and that, in order to avoid a miscarriage of justice, he is now prepared to testify as follows:

> "(a) The first time I ever met Nelson Gross was at the 1968 Republican National Convention; and then only very casually. I believe I met him again at the inauguration of President Nixon in January, 1969, and then not again until the June 1969 primary campaign for Governor. Immediately after the June election, I went to a wedding reception for Paul Sherwin's daughter, attended also by Congressman Cahill and Nelson Gross. Mr. Cahill told us then that Mr. Sherwin would be the campaign manager for the fall campaign, that I was to report to Sherwin in my capacity as financial chairman and Nelson Gross was to be State Chairman, but to report to Sherwin for overall direction of the campaign. From that time up to the date of the election in November, our coordination was through Mr. Sherwin and I don't ever remember seeing or talking to Nelson Gross. He attended no finance meetings and I attended no campaign meetings. In fact, we were told to cover separate areas so as not to duplicate our efforts. I did receive certain lists of prospects from Nelson Gross in Bergen County and did receive from him through Mr. Sherwin, the names of Ned Jesser and William

Preis as prospective hosts of fund-raising cocktail parties for Bergen County.

"(b) I visited with Ned Jesser and also visited Mr. Preis separately at his South Hackensack office on August 14, 1969. At that time Mr. Preis agreed to co-host a party and also pledged on behalf of Triple S Blue Stamp Corporation a contribution of $5,000. Mr. Preis asked how the company could fulfill the pledge in a confidential manner so as to avoid possible difficulties with stockholders and customers who did not want support indicated as to any candidate. I said that the corporation could make its payment to Writers Associates which was receiving campaign contributions and paying campaign expenses. At no time was there any discussion of taking a tax deduction for the contribution.

"(c) Sometime after the party at Arcola on September 9 which Mr. Preis co-hosted, although he did not attend, I asked Miss Sue Phillips of Writers Associates whether the $5,000 pledge had been paid. Seeing that it had not been, I asked her to send out a reminder notice. This she did in the form of a Writers Associates invoice, which we used in certain cases to preserve confidentiality because Writers Associates was asigned to pay certain expenses of the campaign. There was no other person or company in Bergen County that received such an invoice, and it happened in this case only because the $5,000 contribution had not been paid though several weeks had passed since the pledge of August 14, 1969.

Affidavit of Joseph M. McCrane, Jr.

"(d) At no time did I tell Nelson Gross that a Writers Associates invoice was being sent to Mr. Preis. At no time did Nelson Gross ask me to send Preis a bill, voucher or invoice in any form. In fact, at no time did Nelson Gross have any discussion with me at any time concerning Writers Associates, the payment of bills, or any means by which contributors could obtain tax deductions for campaign contributions. Moreover, to my knowledge, Nelson Gross never knew that Writers Associates even existed or who Dick Smith was."

6. That he has read the testimony of Preis that Nelson Gross told him not to worry because he [McCrane] would "plead the Fifth [Amendment]" before the Grand Jury. With respect to this testimony, he is prepared to testify on behalf of Gross as follows:

"At no time prior to my assertion before the Grand Jury on April 27, 1973, of my right not to testify on Fifth Amendment grounds, did I ever tell Nelson Gross that I would assert such a plea. Indeed, until April 21, 1973, well after Gross' purported statement to Preis, I had not discussed with my attorneys or anyone else what action I would take if I were to be called before the Grand Jury. In fact, I was out of the country on a vacation when a Grand Jury subpoena was served upon my wife on April 6, 1973, and I did not return to the country so that I could discuss this matter with anyone until April 21, 1973."

s/ JOSEPH M. McCRANE, JR.

(Sworn to February 25, 1975.)

Excerpts from Transcript of Proceedings

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

Criminal No. 324-73

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NELSON G. GROSS,

Defendant.

April, 1974

(2753)* I will hear those legal arguments.

(The jury left the courtroom, and the following proceedings were had without the hearing or presence of the jury:)

Mr. Besser: Maybe your Honor knows something I don't know.

The Court: I thought you alerted him.

Mr. Goldstein: No, I haven't alerted my adversary up to this point, but I will right now.

* Figures in parentheses refer to each new page of the Stenographic Transcript.

Colloquy

The Court: You told me you have a legal problem.

Mr. Goldstein: I have a matter that counsel should be alerted to in advance because it is an evidentiary problem, evidentiary matter that I think is clear, and the United States has briefed the point.

I have briefs with me.

I do not want to have tomorrow, when I present this witness, I do not want to have Mr. Besser making all kinds of objections.

I'm going to submit to the Court briefs on this point.

Miss Costello, there is an original and a copy here.

What I bring to the Court's attention is the following: I intend to introduce tomorrow, your Honor, (2754) in proving the conspiracy set forth in Count 3, that this defendant, Nelson Gross, assured Mr. Preis on April 12 of last year that he had nothing to be concerned about, nothing to fear, that only two people could contradict this story, and that he didn't have to worry about being indicted for perjury, no one could prove, no women—only two people who could contradict the story, and those two people being Nelson Gross and Joseph McCrane.

The testimony has been replete on Friday and through the course of examination of this week the testimony has been that Gross says to Preis, "I'm not going to talk, and as to McCrane, when his hearing comes up, he's going to take the Fifth Amendment."

I intend to introduce tomorrow, your Honor, by calling the stenographer who was present at the Grand Jury proceedings, I'm going to introduce corroboration of Mr. Preis' testimony that this defendant told him, "Don't worry about any perjury indictments, it's only McCrane and I, McCrane will take the Fifth Amendment," I'm going to prove that pursuant to this conspiracy set forth

Colloquy

in Count 3, that McCrane did in fact just as Nelson Gross told Mr. Preis, Mr. McCrane did in fact take the Fifth Amendment and did in fact refuse to answer questions before the Grand Jury.

That is the proof I intend to offer tomorrow.

(2755) I anticipate that Mr. Besser is going to object to that proof.

We have carefully briefed that argument, your Honor.

I have now submitted the brief to the Court and to my adversary.

I don't want to have this come up tomorrow and then have to delay the jury for a day while we argue back and forth and counsel asks for time to brief the point.

So I thought in fairness to everybody I'd raise the issue this afternoon before we go forward tomorrow, and this will enable counsel, if he wishes, he may have no objection at all, but if he wishes to submit a brief to the Court, if not, your Honor does have the Government's brief.

(2756) Mr. Besser: Mr. Goldstein's concern for this jury and fairness to the defendant is heart-warming. This brief must have been turned out, must have been contemplated weeks ago when Mr. Goldstein first wrote your Honor a little letter saying that he was going to name McCrane as an additional conspirator under Count III.

I cannot believe, in fact I don't think he would dare make the statement to your Honor that it wasn't until today that he conceived of the idea of putting into evidence that which he wishes to offer tomorrow.

If he wanted to be fair, if he didn't want to delay this jury and he wanted to help this defendant out of his concept of fairness, he could have given us this brief when he started this trial, your Honor. But that's neither, nor there.

Colloquy

The attempt to get before this jury the inflammatory evidence of Joseph McCrane, who pleaded the Fifth Amendment, I think is the mark of a desperate prosecutor.

I am really amazed that he would risk the obvious prejudice here to buttress off what he apparently thinks is otherwise a good prosecution by something that is so risky and so fraught with peril and so obviously prejudicial.

Careful prosecutors don't take chances. (2757) Desperate prosecutors take chances, if the Court please.

I object to it.

I'm not going to submit a brief, your Honor. I think it is patently prejudicial, and I will not submit a brief tomorrow because I don't think there is a case that says two plus two equals four. I think we all know that two plus two equals four.

The Court: Mr. Besser, they have heard that testimony twice already, my notes reveal.

Mr. Besser: So that's it.

The Court: And I think Preis on direct examination and I think you also brought it out on cross-examination—

Mr. Besser: He probably volunteered it. He was very good at that.

But, in any event, they have certainly heard it; your Honor is right.

I don't think under the guise of that they should now be permitted to show that that which was promised came to be.

It is too risky. It is too fraught with prejudice, if the Court please.

That's the argument. The Court will make its ruling.

The Court: Yes, Mr. Goldstein?

Colloquy

Mr. Goldstein: Your Honor, I just want to say (2758) one thing: I don't intend at this time to argue the law; the law is set forth very clearly.

I think your Honor should have a chance to read the brief.

But, Mr. Besser, this is no act of a desperate prosecutor, to set the record straight.

Part of this conspiracy, your Honor, was to cover up and to hide that this kind of campaign contributions were being solicited in 1969 and that in 1969 to solicit these kind of contributions businessmen were given fictitious, false and fraudulent invoices to write it off so that they can get business deductions so that it could cost the businessman nothing or maybe half and so it would swell the coffers of the people who were running at that time the gubernatorial campaign of William T. Cahill.

That's what they were doing.

And last year now, fraught with fear that this would all be disclosed when the Grand Jury began to investigate, then they began to pull their horns in and they then began to go to the witnesses we have heard for the last four days of testimony, and they told witnesses to lie, perjure themselves, nothing to worry about, it's a fishing expedition; when indicted, it's a flimsy indictment, constantly reassuring these witnesses that they had nothing to fear, all along protecting their own (2759) position and their own criminality in 1969.

Now, your Honor, the United States seeks to prove not from any act of desperation, but to show the depths and the lengths that this defendant and his co-conspirators and McCrane is a defendant in a case that is before this court--to show the depths that this defendant and his co-conspirator, McCrane, went to, that this defendant as-

sured price "You have nothing to worry about, Mr. Preis, because the only way they can get you for perjury is if either McCrane or I testify against you."

(2760) Me you don't have to worry about. That's true, he's telling a lie, and McCrane, when he comes up for his hearing he's going to take the Fifth Amendment. That is exactly what Joseph McCrane did before the United States Grand Jury. He took the Fifth Amendment before that Grand Jury.

That proof, your Honor, goes to the very gut and the heart of the conspiracy that is before this jury. That proof, your Honor, goes to show that cover-up, to show how this defendant and his cohorts sought frantically during the early part of last year to try to cover up, hide and conceal, and when that wasn't enough, to subborn perjury so the investigation of this United States Grand Jury could be thwarted.

I think that proof is not only proper but it should be before this jury so it can make a full and final determination as to the guilt or innocence of this defendant.

Mr. Besser: Your Honor, if the people who wrote the Fifth Amendment heard what Mr. Goldstein said, they would turn over in their graves. The pleading of the Fifth Amendment, says Mr. Goldstein, is a cover-up.

Mr. Goldstein: There is a difference. You didn't listen very carefully.

Mr. Besser: I am sorry, I withdraw my (2761) remarks. I don't want the speech again.

Your Honor, may I speak very frankly. Every lawyer likes to have an anchor to windward in a criminal trial, and if ever I saw an anchor to windward it would be the admission of this kind of proof.

Now, I have made my objection, if the Court please. The Court will do what it wants to do.

The Court: I am going to read the cases and I will decide it in the morning. The Court is in recess.

[Court adjourned to Thursday, March 14, 1974, at 9:30 a.m.]

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(2764) Mr. Besser: Before your Honor's ruling on this application I should put something on the record and I'd like to do it at sidebar.

(Counsel approached sidebar:)

Mr. Besser: Judge, before your ruling on this proffer by Mr. Goldstein as proof that Mr. McCrane pleaded the Fifth Amendment, pleaded this privilege, refused to testify when he was called before the Grand Jury last spring, between yesterday's session and this morning I have been in telephone communication with McCrane's lawyer, Mr. Lummey in New York.

The Court: I thought Grover Richmond represented him.

Mr. Besser: They are co-counsel, I think.

Mr. Lummey tells me that if I were to subpoena Mr. McCrane to testify in this proceeding with respect to the circumstances under which he pleaded the Fifth Amendment before the Grand Jury he would exercise his privilege and refuse to testify.

The Court: Here?

Mr. Besser: Here. He also advised me—and I have only his verification for it—but I would have thought that out of this wonderful concept of fairness that Mr. Goldstein makes mention of all of the time, that last spring, when the United States Attorney's Office was

(2765) trying to subpoena Mr. McCrane to testify before the Grand Jury, Grover Richmond, McCrane's lawyer, wrote Mr. Goldstein, or Mr. Stern, a letter saying that McCrane, if he did appear before the Grand Jury, would exercise his privilege and refuse to testify.

So that's all I add to the record on the basis of which your Honor will now have to make a ruling.

The Court: Why? What have you got to say, Mr. Goldstein?

Mr. Goldstein: I just want to put a couple of things in context.

Three days—I should put it this way: In the period of time that Mr. Gross learning about the Writers Associates invoice the very next thing that happens is that Mr. McCrane leaves for Antigua, suddenly, and flees the country.

Mr. Besser: Why don't you try to put that in, too?

Mr. Goldstein: As a matter of fact, I was thinking about that last night, Mr. Besser, because I think flight happens to be the best proof of all as to criminal intent on the part of both a defendant and a co-conspirator, which Mr. McCrane is.

McCrane fled this jurisdiction during the pendency of this Grand Jury investigation.

(2766) I think that should be on the record, as well.

The Court: I don't know why you call to my attention that Mr. McCrane, if he was subpoenaed here—

Mr. Besser: Because if it gets in I am totally disabled from eliciting from Mr. McCrane the fact that he exercised his privilege before the Grand Jury on advice of counsel.

I can't even put that in by way of rebuttal. I am totally disabled.

I can't meet it in any way.

The Court: Let's digress for a few minutes.

Mr. Greenberg appeared in my chambers this morning with two packages of what he said were checks. I did not look at them. Now he wants to make a statement on the record.

I assume you want to look at them, too. That's going to delay these proceedings?

Mr. Besser: No, not at all.

I will have someone look at it while we proceed.

• • •

(2871) Boeing Airplane Co. v. O'Malley, 329 F.2d 585 (8th Cir. 1964); United States v. DelPurgitorio, 411 F.2d 84 (2d Cir. 1969). This discretion is likewise addressed by F. R. Crim. P. 6(2) to the disclosure of testimony before the Grand Jury. Because this Court considers the testimony in question relevant and because its prejudicial effect is not apparent as a result of the same testimony having been elicited by both the government and defense at an earlier point in this trial, this Court has decided to permit its introduction into evidence.

This Court, however, will give the jury cautionary instructions.

Are you ready to proceed? Bring the jury down.

Mr. Besser: Could your Honor please tell me now what the instructions will be?

The Court: The jury is here.

Members of the jury, I am permitting this testimony for limited purposes: Namely, (1) Mr. McCrane appeared before the Grand Jury: (2) that he asserted his right to refuse to testify; (3) that it may corroborate the testimony of Mr. Preis to the effect that Mr. Gross informed him of what Mr. McCrane would do.

You should not consider it as bearing on whether McCrane would have incriminated himself or the defendant (2782) here by testifying before the Grand Jury.

Mr. Besser: Your Honor, I don't think that that instruction is correct at all.

The Court: You don't?

Mr. Besser: I think they should be told, in the first place, that it may corroborate. That's for summation.

I believe that the Court should say, "I have permitted it," and they are to make no inferences one way or the other.

The Court: They may or may not.

Mr. Besser: Certainly. I think you should tell them very specifically that he has an absolute Constitutional right to plead the Fifth Amendment before the Grand Jury, that this was an investigation of which he was the specific target, and he had an absolute right on advice of counsel to plead the Fifth Amendment.

This is a right basic to every person, to choose not to testify, as, indeed, as we have seen in this court.

Mr. Goldstein: On the contrary, your Honor, given the testimony in this case—

Mr. Besser: Excuse me. And also that your Honor should tell the jury that the United States Attorney and before he was called to testify was told by McCrane's lawyer that he would not testify.

(2783) Mr. Goldstein: Your Honor, if Mr. Besser wants to put this entire matter in total perspective then I would suggest to the Court that as soon as it became known to these defendants that the United States Grand Jury knew of the Writers Associates invoice, McCrane fled the jurisdiction of the United States, went to Antigua on a boat and was incommunicado to the Grand Jury

and was incommunicado to the United States Attorney's Office.

It was only after an order of this Court that McCrane was brought back on a court order to the United States.

It was then that Mr. McCrane went before the Grand Jury.

And just as Mr. Gross told Mr. Preis, he invoked his Fifth Amendment privilege in that Grand Jury.

(2784) The Court: On advice of counsel.

Mr. Goldstein: No.

The Court: Isn't that so?

Mr. Goldstein: No, your Honor. The testimony is that Mr. Gross told Mr. Preis that Mr. Gross knew he was going to invoke his Fifth Amendment privilege.

And it is not a question of it being on advice of counsel or not, the proof that's being offered by the United States is that Mr. Gross in order to convince Preis, "You can go in there and lie and not worry about it, not only is it a fishing expedition, not only does the Government have to prove that you actually lied, there were no women, but only two people can contradict you, Mr. Preis, that's me, and McCrane, and I know that McCrane is going to take the Fifth."

It doesn't matter, your Honor, under what basis McCrane takes that Fifth Amendment.

The point of the matter is that Gross in order to subborn the perjury of Preis tells Mr. Preis, "I know McCrane is going to take the Fifth Amendment."

And that is to convince Mr. Preis to go into that Grand Jury and lie so that both McCrane and Gross are protected, so that the Grand Jury does not (2785) get behind Mr. Preis' lies.

And that's the essence of the testimony we seek to elicit.

Colloquy

It is to corroborate Mr. Preis' testimony here in this courtroom and to show to this jury how this defendant tried to reassure and convince Mr. Preis that he had nothing to fear because it was only him and McCrane that could in effect turn him in or turn evidence in against him.

That's the basis of the testimony.

And it matters not on what basis Mr. McCrane decides to take the Fifth.

This defendant, Nelson Gross, knew he was going to take the Fifth, and used that knowledge, your Honor, in order to convince Mr. Preis to perjure himself in the Grand Jury.

The Court: Anything else?

Mr. Besser: No.

The Court: I'm going to add to the instructions which I have just read from my prepared notes here, I will also instruct you that Mr. McCrane had the right to invoke his constitutional privilege.

Bring the jury down, please.

Can't we dispose of the other witness before we—

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(2855) [Counsel returned from side bar, and the following proceedings were had within the hearing and presence of the jury:]

The Court: Let the record note that I deny the Government's application to place the information designated as G-53 into evidence.

Mr. Goldstein: Your Honor, the judgment of conviction and the information.

The Court: Denied.

Mr. Goldstein: May we proceed with the next witness?

The Court: Call the next witness, please.

Mr. Goldstein: United States calls Doris Perla.

Doris Perla—for Government—Direct

Doris Perla, called as a witness by the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Goldstein:

Q. Where do you reside, ma'am? A. 368 Thomas Avenue, Lyndhurst.

Q. What is your business or occupation? A. Certified Shorthand Reporter.

Q. What do you mean by "Certified Shorthand (2856) Reporter"; tell the jury what that is, ma'am. A. You are—you take a State exam and you are certified by the Board, and then you can take legal proceedings.

Q. Do you mean by "legal proceedings" just as Mr. Sokol before you is taking down my questions and your answers? A. Right.

Q. Is that correct? A. Yes.

Q. And you are certified to the point that you are at least 95 per cent accurate in transcribing the words that are uttered in a court proceeding; is that correct? A. Yes.

Q. And you have been so certified? A. Yes, I have.

The Court: For how long?

The Witness: A year, over a year.

Q. Directing your attention to April of last year, April 1973, Mrs. Perla, by whom were you employed? A. Waga & Spinelli.

Q. Would you tell us what the business of Waga & Spinelli is? A Agency of Certified Shorthand Reporters.

(2857) Q. Was the agency of Waga & Spinelli engaged to transcribe the minutes of the United States Grand Jury

here in Newark, New Jersey, in this courthouse? A. Yes, they were.

Q. And did you have occasion to transcribe minutes of proceedings in the Grand Jury? A. Yes, I did.

Q. Did you have occasion to transcribe the proceedings of the Grand Jury in which one Joseph McCrane was called to testify? A. Yes, I did.

Q. Have you brought with you your transcription notes of the questions and the answers that were asked Mr. McCrane before the Grand Jury? A. Yes, I have.

Q. Would you tell us, ma'am, when did this hearing take place; can you tell us the data? A. April 27, 1973.

Q. And who was the witness? A. Joseph M. McCrane.

Q. Have you brought with you also a transcription, a typed transcription of your shorthand notes? A. Yes, I have.

Q. Could we identify your shorthand notes, if you'd be good enough?

(2858) These papers here I hold in my hand are your stenographic notes of that hearing, are they not? A. Yes.

Mr. Goldstein: May we mark this with the next exhibit number?

[Exhibit G-56 marked for identification.]

Mr. Besser: Identification?
Mr. Goldstein: Identification only.
Mr. Besser: Where is my copy?
Mr. Goldstein: I gave it to you at side bar.
Mr. Besser: My copy of those notes.
The Court: Let Mr. Besser read the notes. We will declare a recess.

Q. Those notes were later transcribed, were they not? A. Yes.

Q. At my request, did I ask you yesterday to compare your transcribed notes with the actual transcription? A. Yes, you did.

Q. And you did so compare it, did you not? A. Yes, I did.

Q. Now, you have before you, do you not, the entire transcription of the proceedings of that day, have you not? (2859) A. Yes, I do.

Mr. Goldstein: May we mark this as the next Government exhibit number?

[Exhibit G-57 marked for identification.]

Mr. Goldstein: And may I mark this as the next exhibit number?

[Exhibit G-58 marked for identification.]

Mr. Besser: What was the first one?
Mr. Goldstein: G-57 is the entire Grand Jury proceeding.
Mr. Besser: May I see it?
Mr. Goldstein: Sure.
The Court: What's 58?
Mr. Goldstein: G-58 is the excerpted portion of the Grand Jury proceedings that I showed your Honor at side bar.

Q. I am going to show you Government Exhibit 58, Mrs. Perla.

Can you look at that and can you tell us whether or not that reflects the questions and answers that were asked by then United States Attorney Herbert Stern of Mr. McCrane?

If you'd like to compare it with your full transcribed copy I have no objection to that at all, to make sure that they are accurate. (2860) A. Okay.

Q. If you would first compare the excerpted copy, G-58, and make certain that within the excerpted copy it is all reflected accurately in the full transcribed minutes, and once we've done that I'll ask you some questions.

Have you compared the excerpted copy which, I believe, is G-58, with Government Exhibit 57 for identification? A. Yes, I have.

Q. Exhibit G-58, which is the excerpted copy, is it an accurate recitation of the questions that were asked by Mr. Stern of Mr. McCrane in the Grand Jury room? A. Yes.

Q. Would you be good enough, Mrs. Perla, to read the excerpted copy to the jury at the present time?

Can I help you?

A. "Joseph M. McCrane, Jr., sworn.

"Examination by Mr. Stern:
"Question: What is your name, sir?
"Answer: Joseph M. McCrane, Jr.
"Question: Where do you reside?
"Answer: Rancocas, New Jersey.
"Question: All right—"

(2861) Mr. Goldstein: That reflects a gap now, you have excerpted out certain questions?

The Witness: Yes.

Q. Okay. A. "Question: All right, Mr. McCrane, what is your business or occupation?

"Answer: I was Treasurer of New Jersey.
"Question: What is your business or occupation today?
"Answer: I refuse to answer that or any further questions on the grounds that the answer to that question or any further questions might tend to incriminate me.
"Question: You mean the answer to what you presently do for a living might tend to incriminate you? You can take the Fifth Amendment if you wish. I just want to make sure you understand.
"Answer: I don't know what the proper terms are. All I know is I am just supposed to answer my name, rank and serial number, and other further questions I am to say I refuse to answer that question or any further questions on the grounds that the answer to that question or any further questions might tend to incriminate me."

(2862) Then it shows—
Q. There is more? A. There is more.

"Question: Are you aware of the firm known as Writers Associates?
"Answer: I restate the position that I have already taken, which is I refuse to answer that question or any further questions on the grounds that the answer to that question or any further questions might tend to incriminate me.
"Question: Did you direct anyone to issue false and fictitious invoices from Writers Associates to

Hialeah Race Track, Atlantic City Racing, Cresci Aviation, Camden Trust Company of New Jersey, the Stop and Save Company, Interser International, Trap Rock Construction Company or Passaic Pavement Company?

"Answer: I restate the position that I have already taken, which is I refuse to answer that question or any further questions on the grounds that the answer to that question or any further questions might tend to incriminate me."

Q. Then there is another gap? A. Yes. And then Mr. Stern, "Thank you, Mr. McCrane. Witness excused."

Mr. Goldstein: Thank you very much. No (2863) further questions.

I ask that the excerpted copy be marked into evidence at this time.

(Exhibit G-58 received and marked in evidence.)

The Court: Cross-examination?

Mr. Besser: No questions.

The Court: You may step down.

Members of the jury, listen to me very carefully—

Mr. Goldstein: Your Honor, I think Miss Perla would like to take these back. They are her official records.

The Court: Again, members of the jury, listen to me very carefully. I am permitting this testimony for limited purposes, namely, one, that Mr. McCrane appeared before the Grand Jury.

Two. He asserted his rights and refused to testify.

Three. That is may or may not corroborate the testimony of Mr. Preis to the effect that Mr. Gross informed him of what Mr. McCrane would do.

You should not consider it as bearing on whether McCrane would have incriminated himself or the defendant hereby testifying before the Grand Jury.

I also instruct you that Mr. McCrane had the (2864) right to invoke his constitutional privilege, that is, taking the Fifth Amendment, and I so instruct you.

Call your next witness.

Mr. Goldstein: The United States rests.

Mr. Besser: Your Honor, before Mr. Goldstein rests, I asked him two minutes ago whether he was prepared to rest and he said the didn't know. I think I should address the Court at side bar.

The Court: Come over, please.

(Whereupon the following was had at side bar:)

Mr. Besser: Before he rests, your Honor, I do want to move to strike the testimony of Suzanne Phillips Miller. You will recall it related to her testimony based on those ledger sheets of Writers Associates that had paid expenses of the Cahill campaign.

Now, he brought that out on the basis of the ledger sheets. On cross-examination it was very clear that Suzanne Phillips Miller had no familiarity with those ledger sheets, had never seen them until the day before in Mr. Goldstein's office. They were not made under her supervision. She could not testify on the basis of any personal knowledge that those expenditures had been made.

She had in fact, and she admitted on cross-examination, merely read certain entries on that exhibit with which she had no identification or connection what—

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(4801) convicted, Stop & Save Trading Stamp Corporation, convicted. That's a conspiracy.

The fraud, the fictitious fraudulent documentation.

And so he now has to tell Preis to induce him to go down and to lie to the Grand Jury, "Difficult crime to prove, can't disprove no women, but only McCrane and I can contradict you.

"I'm not going to talk, and I can tell you that when McCrane goes down for his hearing he's going to take the Fifth."

And this is Nelson Gross, now knowing in 1973 that Joseph McCrane would take the Fifth Amendment before the United States Grand Jury when it is his time to testify.

This is Nelson Gross who never spoke to Joseph McCrane all during the year of 1969 during the campaign.

This is Nelson Gross in 1973 during the Grand Jury investigation assuring William Preis, "Do not worry, Mr. Preis, go down, lie, they can't catch you, they can't prove there were no women, and the only witnesses against you, the only two witnesses, McCrane and myself, are not going to talk. McCrane will take the Fifth."

(4802) And as it happens, and has been proved to you through the Grand Jury stenographer, Joseph McCrane, just as Mr. Gross used it to induce

Mr. Preis to come down to the Grand Jury and lie, Joseph McCrane, you may find as part of the conspiracy or you may find to corroborate Mr. Preis' testimony, Joseph McCrane took the Fifth Amendment in the United States Grand Jury.

And that is what induced Mr. Preis to come down to lie.

He felt safe in those lies because he was told by a lawyer, Nelson Gross, there was no way we could prove otherwise, and the other witnesses would take the Fifth or wouldn't testify.

And there is a meeting—I do want to say one thing parenthetically, I am going to finish before lunch, that makes you all happy—yesterday you were here for a long, long day.

During the entire period of time from around 10:30, 10:45 in the morning until 5:25 last night we had excruciating detail after detail after detail about this entire case.

And when it came time for the month of April we saw a calendar, and in Mr. Besser's words, "I'm going to hustle right through this, we're going • • •

• • •

Affidavit of J. Robert Lunney, Esq.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

NELSON G. GROSS,

Appellant.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

J. ROBERT LUNNEY, being duly sworn, says:

1. I am a member of Lunney & Crocco, New York, N.Y., trial counsel to Richman, Berry, Ferren & Tyler, Haddonfield, N.J., attorneys for Joseph M McCrane, Jr. and am familiar with the facts herein.

2. In the spring of 1973, New Jersey's top law enforcement officials, Herbert J. Stern, then U.S. Attorney for New Jersey, and George F. Kugler, then State Attorney General were engaged in parallel investigations into Governor Cahill's 1969 campaign.

Affidavit of J. Robert Lunney, Esq.

3. By letter dated April 17, 1973, Stern advised Grover C. Richman, Jr., Esq., that the grand jury requested McCrane's appearance. Exhibit A. With tongue-in-cheek, Stern facetiously added, "that you would not wish this investigation to conclude without your client having . . . the opportunity to make his position known to the Grand Jury". At the time, McCrane was out of the country on a business and pleasure trip. By telephone and return letter the same date, April 17, 1973, Mr. Richman repeated his advice to Stern that if McCrane did appear he would exercise his constitutional right to refuse to testify. Exhibit B. Counsel also questioned the propriety of utilizing the subpoena power and assured the U.S. Attorney that McCrane would return to the jurisdiction in the near future. Portions of this correspondence subsequently appeared in the press.

4. The U.S. Attorney then applied to Judge Frederick B. Lacey for an order directing the service of a grand jury subpoena on McCrane. Extensive publicity attended the U.S. Attorney's public statements that McCrane was "a key target of the probe" and his trip abroad was "an attempt to dodge the lawful process of this grand jury".

5. On April 27, 1973, McCrane appeared before the grand jury. When McCrane did invoke his constitutional privilege against self-incrimination, the U.S. Attorney made a prearranged application to Judge Lacey for an order compelling his testimony. Mr. Richman requested that the matter be heard *in camera* on the ground that it would be prejudicial to McCrane's rights to make it public, citing the local Rules of the District Court.

6. Judge Lacey acknowledged the existence of the Rules, passed while he was U.S. Attorney, but then stated he would apply the Rules "when we come to that phase of the proceeding". He then recognized Stern who proceeded to review the matter in open court in the presence of the waiting press, fortuitously assembled for the event. In so doing, he referred to the government's earlier application to compel McCrane's presence, to the questions asked him before the grand jury concerning his "activities with the firm of Writer [sic] Associates in procuring false and fraudulent billings" and to his invocation of the Fifth Amendment in response to said questions.

7. Mr. Richman objected on the record to the hearing of the application in open court and took exception to the references to McCrane's absence from the country. The U.S. Attorney repeated these references and reiterated the government's attempts to obtain McCrane's appearance. Mr. Richman again objected to such discussion in open court "for pure publicity purposes".

8. With the assembled press taking their notes the Court then lectured McCrane and his attorneys on the privilege against self-incrimination. The Court emphasized the privilege "is confined to instances where the witness has reasonable cause to apprehend danger from a direct answer" but that "a witness' claim of the privilege is not final".

9. In response to the Court's invitation, Stern stated that the investigation was to determine whether there was a "scheme to defraud the United States in connection with certain practices of securing money during the 1969 gubernatorial compaign" and the grand jury "became convinced

that Mr. McCrane was an individual who would be in possession of testimony which could shed considerable light on that basic investigation".

10. The Court then had the reporter read the questions asked McCrane before the grand jury. Mr. Richman continued to object to the proceedings being read in open court as unduly prejudicial to McCrane. The Court immediately overruled these objections and ordered the entire proceedings read into the record. After answering the usual "name, rank and serial number" questions, McCrane invoked the Fifth Amendment. Most of the twenty five questions concerned an alleged tax scheme.*

11. After full public venting for two hours, the Court finally recessed and an *in camera* hearing was finally held in Judge Lacey's chambers for ten minutes. Upon returning, the Court referred to the U.S. Attorney's statements in open court, read extensive portions of the *Preis* indictment in which it was alleged that McCrane masterminded a tax fraud scheme and cited two crimes of which he might be guilty and concluded that the witness "justifiably invokes the Fifth Amendment as to most of the

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* Typical of Stern's loaded questions was, "Did you direct anyone to issue false and fictitious invoices from Writers Associates to Hialeah Race Track, Atlantic City Racing, Cresci Aviation, Camden Trust Company of New Jersey, Stop-and-Save Trading Stamp Corporation, Trap Rock Construction Company, Passaic Paving Company?" Stern thus obtained Fifth Amendment pleas that he could then have read to the press with the imprimatur of Judge Lacey. In addition, McCrane's compulsory appearance to plead the Fifth Amendment was contrived to obtain the alleged evidence of a so-called conspiracy with Gross that McCrane would "take the Fifth".

questions that were put to him". The Court then had McCrane return to the grand jury to answer just three questions pertaining to his occupation and whether he had been questioned by any state grand jury.

12. The manner in which the U.S. Attorney and the Court conducted McCrane's grand jury appearance resulted in extreme prejudicial publicity. McCrane's valid use of the Fifth Amendment, his proper refusal to sign a waiver of immunity and the subject matter of the questions asked, traditionally protected by the secrecy of the ground jury proceedings, together with the Court's ruling that McCrane might be guilty of conspiracy and tax fraud, all became public knowledge and the subject of intense newspaper coverage.

13. While the case against McCrane was moving through the federal grand jury, the State was moving its case against McCrane through its grand jury, all to the accompaniment of extensive publicity. This race to indictment wound up with the State as the winner, with an indictment against McCrane filed on May 15, 1973.

14. On May 22, 1973, just two weeks before the primary election, Nelson G. Gross was indicted by the federal grand jury and McCrane named as an unindicted co-conspirator. On May 24, 1973, the federal indictment against McCrane was filed. Both were highly publicized.

15. Immediately following the McCrane federal indictment, a series of staggered federal indictments were returned against various corporations named in his indictment, alleging they filed false tax returns. On May 29, 1973, indictments were returned against Interser International, Inc. and Bellante, Clauss, Miller & Nolan, Inc.; on May 31, 1973, against Trap Rock Industries, Inc. and John F. Meade, Inc.; and on or about June 12, 1973 (a week after the primary) against Gerald Electric Construction Co., Inc. and Charles H. Knecht & Sons, Inc.*

16. The State, asserting its priority over the federal indictment, pressed for an early trial against McCrane. In February 1974 the State case was scheduled for trial on April 15, and then adjourned peremptorily to April 29, 1974. Exhibit C. Defendants' motions for severance and change of venue were all denied. The State trial actually commenced in May 1974 and the period from the filing of the indictment, May 15, 1973, to the trial was taken up with motions, discovery and preparation. It was understood that the federal indictment against McCrane was to be scheduled after the State case. While the State went forward with the McCrane prosecution the federal government proceeded with the prosecution of Gross.

17. Prior to the commencement of the Gross trial, Albert G. Besser, Esq., Gross' attorney, communicated with me and requested that McCrane appear as a witness. I advised Mr. Besser in view of the pending state and federal indictments against McCrane that if called, he would avail himself of his constitutional privileges and refuse to testify.

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* On October 31, 1973, the eve of the general election, four more indictments were filed against Atlantic City Racing Association, Garden State Racing Association, Hialeah Race Course, Inc. and Monmouth Park Jockey Club.

18. On or about March 13, 1974 after the Gross trial commenced, Mr. Besser again requested McCrane's appearance and I similarly advised Mr. Besser that we were in the middle of preparing for the State case and in view of the State and federal indictments pending against McCrane, that if called he would avail himself of his constitutional privileges and refuse to testify. In addition, I requested that Mr. Besser so advise the government and the Court of McCrane's position and he agreed to do so.

19. On May 30, 1974, the third day of McCrane's state trial, the Court directed a mistrial because of prejudicial misconduct by the jury. The case has never been re-tried. The federal government only then began to proceed toward the McCrane trial. On September 19, 1974, 9 days after the McCrane federal trial commenced, a mistrial was ordered because of prejudicial publicity and an accumulation of events which caused the court to seriously question whether McCrane could receive a fair and impartial trial. On October 25, 1974, after four days of another futile attempt in empanelling an impartial jury and with the argument for a writ of *mandamus* for a change of venue before this Court, the District Court was compelled to order the transfer of the McCrane federal case to the Middle District of Pennsylvania. This extraordinary relief was ordered after the obvious conclusion was reached that there was so great a prejudice against McCrane that he could not obtain a fair and impartial trial in New Jersey.

23. In December 1974, at the close of the government's case, the Court in the Middle District of Pennsylvania di-

rected verdicts of acquittal on seven of the eleven counts against McCrane, including the conspiracy count. Thereafter, on December 11, 1974, a jury found McCrane guilty on the four remaining counts. This Court, on December 18, 1975, affirmed McCrane's conviction on two of these counts and, because of the government's intentional withholding of material evidence, reversed and remanded for a new trial the remaining two counts. A petition for *certiorari* to the Supreme Court was filed by McCrane after rehearing was denied by this Court and is presently pending.

s/ J. Robert Lunney

(Sworn to March 17, 1976)

Letter dated April 17, 1973 from United States Attorney to Grover C. Richman, Jr., Esq.

UNITED STATES DEPARTMENT OF JUSTICE

United States Attorney
For the District of New Jersey
Newark, New Jersey 07101

April 17, 1973

Grover C. Richman, Jr., Esquire
Richman, Berry Ferren & Tyler
41 Grove Street
Haddonfield, New Jersey 08033

Dear Mr. Richman:

As I am sure you are aware, the United States Grand Jury for the District of New Jersey has been attempting to obtain the appearance before it of your client, Joseph McCrane, Jr., for exactly two weeks now.

The first attempt to serve Mr. McCrane occurred on Tuesday, April 3, 1973, when a subpoena was left with Mrs. McCrane who advised the agents that Mr. McCrane was out of town on business and would return by that very weekend.

As you know, Mr. McCrane not only failed to return that weekend, but numerous contacts between this office and yourself and Mrs. McCrane have utterly failed to locate the exact whereabouts of Mr. McCrane other than general statements by you that he is the Caribbean on his yacht.

I find it difficult to believe that a man who has so many business and other ties here in New Jersey could so completely absent himself from the State so as to lose all contact and so as to make it impossible to determine his exact whereabouts for two solid weeks.

Letter dated April 17, 1973 from United States Attorney to Grover C. Richman, Jr., Esq.

I must also point out that this situation began and continued for an entire week before there was any notice in the public press about the investigation and has continued for an entire week thereafter.

As you have been repeatedly advised, it is necessary to the proper resolution of the investigation now in progress that the United States Grand Jury be given an opportunity to hear the testimony of Mr. McCrane. I am certain that you would not wish this investigation to conclude without your client having had at least the opportunity to make his position known to the Grand Jury.

In any event, since it appears that Mr. McCrane will not voluntarily appear before the Grand Jury, we are going to have to take steps to subpoena him. Accordingly, if I do not hear from you by the close of business today giving us a date certain this week when Mr. McCrane will appear before a Grand Jury, I will have no alternative other than to use the provisions of Title 28 U.S.C. Section 1783 which will enable us to subpoena Mr. McCrane, as an American national, even though he is beyond the territorial limits of the continental United States.

Sincerely,

HERBERT J. STERN
Herbert J. Stern
United States Attorney

HAND DELIVERED

Received by: (Illegible)
Date: 4/17/73
Time: 11 A.M.

Letter dated April 17, 1973 from Grover C. Richman, Esq. to United States Attorney

RICHMAN, BERRY, FERREN & TYLER
Law Offices
Haddonfield, New Jersey 08033

41 Grove Street

April 17, 1973

Telephone 795-4100
Area Code 009

Herbert J. Stern, United States Attorney
For the District of New Jersey
U. S. Dept. of Justice
Newark, New Jersey 07101

Dear Mr. Stern:

I have already acknowledged your hand delivered letter of April 17, 1973.

I am sure that you know that, upon more than one occasion I have informed your office that Joseph McCrane, if called before your Federal Grand Jury would exercise his constitutional right to refuse to testify. Your continued insistence upon Mr. McCrane's appearance before the Grand Jury appears to violate the principles in United States v. Maloney, 262 F.2d 535, 537-8 (2d Cir. 1959); San Fratello v. United States, 340 F 2d 560 (5th Cir. 1965). Although those cases dealt with trials, their rationale seem even more applicable to a Grand Jury proceeding.

Letter dated April 17, 1973 from Grover C. Richman, Esq. to United States Attorney

Additionally, if he does appear, Mr. McCrane subjects himself to the risks of being subjected to further improper inquiry as to the reason for his exercise of his constitutional rights.

Under these circumstances, I must question the propriety of your utilization of the subpoena power under Section 1783 of Title 28, aside from the problems presented by in re: Stern 235 F Sup. 680 (1964) and U. S. v. Thompson 319 Fed. 2d 665 (Cir. 1963).

Please be assured that Mr. McCrane has every intention of returning to the United States and to New Jersey in the near future and probably shortly after this coming Easter.

In all of the foregoing circumstances it would be most unfortunate and thoroughly prejudical to Mr. McCrane if any further publicity, with particular reference to the contents of this letter should occur.

As you know, I am always interested in cooperating with the United States but I must first look to the rights of my client.

Very truly yours,

RICHMAN, BERRY, FERREN & TYLER

Grover C. Richman, Jr.

GCR:jcl

Letter dated February 28, 1974 from Judge Schoch to Kenneth P. Zauber, Esq.

SUPERIOR COURT OF NEW JERSEY
Law Division
Mercer, Hunterdon and Somerset Counties

February 28, 1974

George Y. Schoch
Assignment Judge

Mercer County Court House
Trenton, New Jersey 08007
Telephone (609) 989-8000

Kenneth P. Zauber, Esq.
Chief, Trial Section
Division of Criminal Justice

Richman, Berry, Ferren & Tyler, Esqs.
Att: Edwin T. Ferren III, Esq.

Schapira, Steiner & Walder, Esqs.
Att: Justin P. Walder, Esq.

Dino D. Bliablias, Esq.

Re: State of N.J. vs. Joseph M. McCrane, Jr.,
Wm. B. Colsey, III, Bruce A. Mahon
Indictment #SGJ-15-73-9A

Gentlemen:

Because of personal reasons it will be necessary for me to change the trial date of this matter. Therefore, this case will be set down for trial peremptorily Monday, April 29 instead of April 15. I trust the change is given to you sufficiently in advance so that there will be no problem. The time table for discovery remains the same.

Very truly yours,

GEORGE Y. SCHOCH
George Y. Schoch, A.J.S.C.

GYS:mt

Opinion of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-2375

UNITED STATES OF AMERICA,

v.

NELSON G. GROSS,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
(D.C. Criminal No. 324-73)

Argued March 8, 1976

Before:

VAN DUSEN, KALODNER and WEIS, *Circuit Judges.*

James D. Crawford, Esquire
Schnader, Harrison, Segal & Lewis
1719 Packard Building
Philadelphia, Pennsylvania
Attorneys for Appellant

Jonathan L. Goldstein, Esquire
United States Attorney

John J. Barry, Esquire
Assistant U. S. Attorney
Federal Building
Newark, New Jersey 07101
Attorneys for Appellee

OPINION OF THE COURT

(Filed—April 22, 1976)

PER CURIAM:

This case is before the court for the second time. The facts which form the background for the current appeal have been carefully detailed in our previous opinion, 511 F.2d 910 (3d Cir.), *cert. denied,* 44 U.S.L.W. 3258 (U.S. Nov. 3, 1975), and in that of the district court, 375 F. Supp. 970 (D. N.J. 1974). We need not repeat them here.

After the rejection of defendant's first appeal, he petitioned for rehearing. In the order denying his request, this court deferred consideration of several points which it considered as more properly subjects of a motion for a new trial in the district court. The defendant thereafter filed such a motion, alleging the existence of newly discovered evidence and the withholding of exculpatory material by the government at the tiral. In an opinion delivered from the bench, the district court refused to grant an evidentiary hearing and then denied defendant's motion.

The test applicable to a motion for a new trial on the basis of newly discovered evidence is set out in *United States* v. *Meyers,* 484 F.2d 113, 116 (3d Cir. 1973), and *United States* v. *Bertone,* 249 F.2d 156 (3d Cir. 1957). We conclude that the district court properly applied these standards, and did not abuse its discretion in refusing to grant a new trial.

The "newly discovered" evidence is more accurately described as "newly available" evidence which resulted from two events: the trial of Joseph McCrane, and the immunity granted to Richard H. Smith at that proceeding. It is contended here that, because McCrane's attorneys had made it clear that he would invoke the Fifth Amendment if called as a witness, he was not available as a witness at Gross' trial. In an affidavit McCrane now asserts, if called, he would testify that he had not told Gross that he, McCrane, would invoke the Fifth Amendment before the grand jury and, further, that he and Gross operated independently during the Cahill campaign.

Preliminarily, we note that Gross did not request a continuance so that McCrane could be tried first. *See,* for example, *United States* v. *Alper,* 449 F.2d 1223 (3d Cir. 1971), *cert. denied,* 405 U.S. 988 (1972). Moreover, we must exercise great caution in considering evidence such as this as to be newly discovered. *United States* v. *Jacobs,* 475 F.2d 270, 286 n.33 (2d Cir.), *cert. denied,* 414 U.S. 821 (1973). Nevertheless, a careful review of the McCrane affidavit satisfies us that it does not warrant the grant of a new trial.

At Gross' trial, Preis testified that Gross commented, "I happen to know that Joe McCrane is going to plead

the Fifth. . . ." McCrane's affidavit does not contradict this critical statement. Rather, it merely states that *he* did not tell Gross. In addition to the chance that Gross might have received the knowledge indirectly, the defendant might have been surmising or anticipating what would happen—or he might have been lying to Preis. Either is possible even if the McCrane statement were accepted as correct.

Defendant asserts that the facts of independence of action between him and McCrane during the campaign became critical when the prosecutor in his closing to the jury labeled that contention an outrageous lie. However, there was evidence of that fact available from other sources and that ground for a new trial, if it had any merit, should have been advanced in the first post-trial motion.

McCrane's testimony was not the only vehicle available for negating Gross' guilt, and we do not believe the affidavit supplies evidence which would have probably produced an acquittal. Therefore, it does not satisfy the *Meyers* criteria.

The same comments apply generally to Smith's testimony. Smith was unavailable until he was granted immunity at the McCrane trial. He testified there that Writers Associates was a vehicle for anonymity and that corporations wishing to make tax deductible contributions could do so by simply subscribing to the Garden State Directory, an advertising publication. However, Susan Phillips Miller did testify at the Gross trial and was aware of most of the details of Writers Associates activities. From the record, it is evident that she knew

both of Writers' invoicing procedure and of the existence of the Garden State Directory.

Similarly, the Donahue affidavit describes grounds which might have been asserted in the first pretrial motion but, in any event, is merely cumulative impeachment evidence.

The defendant also contends that the government violated its obligation under *Brady* v. *Maryland*, 373 U.S. 83 (1963), in failing to disclose certain exculpatory material. The Supreme Court pointed out in *Moore* v. *Illinois*, 408 U.S. 786, 794-795 (1972), that, in examining potential *Brady* material, three factors must be considered:

1. suppression by the prosecution after request by the defense;
2. favorable character of the evidence for the defense; and
3. the materiality of the evidence.

Our detailed review of the various items listed by the defense convinces us that the withholding of this material by the government was not a *Brady* violation.

For example, the defendant places particular emphasis on the non-disclosure of a 1970 Kaplan invoice. But the existence of a 1969 invoice was the crucial issue and it is apparently conceded that no such invoice ever existed. Similarly, defendant has not shown the materiality of the F.B.I. investigation on the typewriter used to type a legend on a Writers Associates invoice. At trial, it was admitted that the critical wording was not on the document when Writers sent it to Preis.

Opinion of the United States Court of Appeals for the Third Circuit

The tax data concerning Trap Rock constituted impeachment material, and, as we pointed out in *United States* v. *McCrane,* 527 F.2d 906 (3d Cir. 1975), *petition for cert. filed* 44 U.S.L.W. 3533 (U.S. Mar. 23, 1976) (No. 75-1323), not all impeaching matter must be disclosed. The obligation extends only to that which is material and which, under the circumstances, is reasonably likely to affect the judgment of the jury. *United States* v. *Harris,* 498 F.2d 1164 (3d Cir.), *cert. denied,* 419 U.S. 1069 (1974). Under the facts of this case, the Trap Rock material does not meet the prescribed test.

As another example, the Mailmar invoice does not constitute an outright or even implied contradiction of witness Striar's testimony. We cannot conceive that this invoice would have had any substantial effect on the result of the trial.

These few comments are not designed to be an exhaustive exposition of all defendant's contentions but merely illustrate the lack of substance to his *Brady* and newly discovered evidence allegations. Our own examination of the defendant's motion and the supporting documents demonstrate that the district court did not err in denying a new trial. The order of the district court will be affirmed.

To the Clerk:

Please file the foregoing opinion.

Circuit Judge

Judgment of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 75-2375

UNITED STATES OF AMERICA

vs.

NELSON G. GROSS,

Appellant.

(D.C. Criminal No. 324-73)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present:

VAN DUSEN, KALODNER and WEIS, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

Judgment of the United States Court of Appeals for the Third Circuit

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed December 4, 1975, be, and the same is hereby affirmed.

ATTEST:

M. ELIZABETH FERGUSON
Chief Deputy Clerk

April 22, 1976

Order of the United States Court of Appeals Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 75-2375

UNITED STATES OF AMERICA

v.

NELSON G. GROSS,

Appellant.

SUR PETITION FOR REHEARING

Present:

SEITZ, *Chief Judge*, KALODNER, VAN DUSEN, ALDISERT, ROSENN, HUNTER and WEIS, *Circuit Judges*.

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision

Order of the United States Court of Appeals Denying Petition for Rehearing

having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

ILLIGIBLE
Judge

Dated May 11, 1976

Supreme Court, U. S.
FILED
AUG 24 1976
MICHAEL RODAK, JR., CLERK

No. 75-1785

In the Supreme Court of the United States

OCTOBER TERM, 1976

NELSON G. GROSS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

SCOTT P. CRAMPTON,
Assistant Attorney General,

ROBERT E. LINDSAY,
CHARLES E. BROOKHART,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1785

NELSON G. GROSS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The first opinion of the district court (Pet. App. 26a-43a) is reported at 375 F. Supp. 971. The first opinion of the court of appeals affirming petitioner's conviction (Pet. App. 1a-22a) is reported at 511 F. 2d 910.

The district court did not file a written opinion denying petitioner's motion for a new trial on the grounds of newly discovered evidence. The opinion of the court of appeals on that issue (Pet. App. 83a-88a) is not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 89a-90a) was entered on April 22, 1976, and a petition for rehearing was denied on May 11, 1976 (Pet. App.

91a-92a). The petition for a writ of certiorari was filed on June 9, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial court correctly denied petitioner's motion for a new trial on the ground of newly discovered evidence, where such evidence was proposed testimony that would not contradict any of the evidence of petitioner's guilt.

STATEMENT

After a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted of aiding and assisting the filing of a false and fraudulent tax return (26 U.S.C. 7206(2)), obstruction of justice (18 U.S.C. 1503), subornation of false declarations (18 U.S.C. 1622), and two counts of conspiracy (18 U.S.C. 371). The court sentenced petitioner to concurrent two-year prison sentences on two counts and fines of $10,000 on the other three counts. The court of appeals affirmed (Pet. App. 1a-22a), and this Court denied certiorari (423 U.S. 924).

Petitioner then filed a motion in the district court for a new trial under Rule 33 of the Federal Rules of Criminal Procedure, asserting the existence of newly discovered evidence. In an opinion delivered from the bench, the district court refused to hold an evidentiary hearing and denied petitioner's motion. The court of appeals affirmed *per curiam* (Pet. App. 83a-88a).

The evidence adduced at trial may be summarized as follows:

While seeking contributions to William Cahill's gubernatorial campaign in New Jersey in July 1969, petitioner approached William Preis, president of Stop & Save

Trading Stamp Corporation, concerning a possible $25,000 cash contribution to the campaign by his company. When Preis indicated that the company could not pay that much in cash, petitioner proposed an "easy solution" whereby Preis would make a $5,000 contribution by check and Gross would provide the company with a bill for services rendered. Petitioner stated that "since it would be passed through as an operating expense it would become tax deductible, and it would actually only cost you half as much" (Pet. App. 3a; Tr. 1911-1912).[1]

Preis asked if this method of payment was legal. Petitioner assured him that if it was discovered, the worst that could happen would be a disallowance of the deduction by the Internal Revenue Service (Pet. App. 3a; Tr. 1948-1949). Thereafter, in September 1969, Preis disguised the $5,000 contribution as a business payment on a fictitious invoice from Writers Associates. This payment was treated by Stop & Save's accounting department as an expense item (Tr. 1953-1957) and was thereafter falsely reported on the income tax return of Grand Union (Stop & Save's parent corporation) as a deductible expense (Tr. 2794).

In March 1973, as part of an investigation of political activities in Bergen County, New Jersey, a federal grand jury issued a subpoena to Stop & Save, requiring production of all of its records relating to Writers Associates. Preis confronted petitioner with the subpoena and the invoice, and asked "Where do we go from here?" (Pet. App. 3a; Tr. 1993). Petitioner responded that Preis should tell the grand jury that the invoice represented payment for services rendered in connection with

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[1] "Tr." references are to the transcript of trial.

a demonstration against an anti-trading stamp bill which had been pending in the state legislature (Pet. App. 3a; Tr. 1994). When Preis asked why he should not tell the facts as they were, petitioner responded that if Preis told the truth to the grand jury "at this late stage of the game, [he would] immediately be cited for conspiracy and for fraud" (Pet. App. 4a; Tr. 1999).

On April 12, 1973, Preis, accompanied by his corporate counsel, met with the government prosecutors. When they questioned him about the Writers Associates invoice, Preis answered with the contrived story about the demonstration. The prosecutors indicated that they did not believe the story and told Preis to reconsider the whole matter and come back and tell the truth to the grand jury (Pet. App. 4a; Tr. 2001).

Preis then met with petitioner and told him what had happened at the United States Attorney's office. At that time, petitioner told Preis that the government would not be able to prove Preis' perjury. Petitioner stated to Preis (Pet. App. 4a; Tr. 2009):

> The only ones that really know the story behind this is [*sic*] myself and Joe McCrane. And I happen to know that Joe McCrane is going to plead the Fifth when he comes up for his hearing, and certainly I'm not going to tell, * * * so you have nothing to worry about for perjury. * * * You can go right back and tell that same story, and you will get off absolutely free.

Thereafter, on April 17, 1973, Preis appeared before the grand jury and "[told] that same story." He falsely testified that the payment to Writers Associates was for a women's demonstration against an anti-trading stamp bill at the State Capitol in Trenton, New Jersey. Preis was later indicted for making false declarations

to a grand jury, in violation of 18 U.S.C. 1623. On advice of new counsel, he pleaded guilty and received permission to go back to the grand jury and tell the truth about his participation with petitioner in the Cahill campaign. The indictment against petitioner followed (Pet. App. 5a; Tr. 2021-2031).

During the trial, Preis testified that petitioner told him "I happen to know that Joe McCrane is going to plead the Fifth when he comes up for his hearing * * * " (Tr. 2009). To corroborate this testimony, the government introduced evidence that McCrane had invoked his Fifth Amendment privilege before the grand jury (Tr. 2855-2862). With respect to the evidence of McCrane's Fifth Amendment claim, the district court instructed the jury that McCrane had a right to claim the privilege and that his doing so had no bearing on whether he would have incriminated himself or petitioner had he testified (Tr. 2781-2782, 2863-2864). At the time of the trial, McCrane was awaiting trial on another indictment and he had indicated, through counsel, that he would invoke his Fifth Amendment privilege if called as a witness at petitioner's trial (Pet. App. 45a).[2]

While the case was pending in the court of appeals, petitioner obtained an affidavit from McCrane which stated that at no time prior to his invocation of the Fifth Amendment before the grand jury did he tell peti-

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[2]McCrane was subsequently convicted of four counts of aiding the preparation of fraudulent income tax returns, in violation of 26 U.S.C. 7206(2). The court of appeals vacated and remanded for a new trial McCrane's conviction on two of the counts (527 F. 2d 906). However, on June 30, 1976, this Court granted the government's petition for a writ of certiorari (No. 75-1464) and remanded the case to the court of appeals for consideration in the light of *United States* v. *Agurs*, No. 75-491, decided June 24, 1976.

tioner that he would make such a claim of privilege (Pet. App. 44a-48a, 85a). Based upon this "newly discovered" evidence, petitioner moved the district court for a new trial under Rule 33 of the Federal Rules of Criminal Prodecure. This district court denied the motion and the court of appeals affirmed *per curiam* (Pet. App. 83a-88a).

ARGUMENT

1. In order to prevail on a Rule 33 motion for a new trial on the basis of newly discovered evidence, a defendant must show that the evidence was discovered after the trial, that the failure to learn of the evidence was not the result of lack of diligence, that the new evidence is not merely cumulative or impeaching, that the evidence is material to the principal issues involved, and that the evidence is of such a nature that it would probably produce an acquittal. *United States* v. *Meyers*, 484 F. 2d 113, 116 (C.A. 3). See also *United States* v. *Slutsky*, 514 F. 2d 1222, 1225 (C.A. 2). When, as here, the "newly discovered" evidence is simply "newly available" evidence (*i.e.*, evidence which existed all along but which was unavailable at trial), the courts have hesitated to consider such evidence to be newly discovered. See, *e.g.*, *United States* v. *Jacobs*, 475 F. 2d 270, 286, n. 33 (C.A. 2), certiorari denied *sub nom. Lavelle* v. *United States*, 414 U.S. 821. See also *United States* v. *Alper*, 449 F. 2d 1223, 1234 (C.A. 3), certiorari denied *sub nom. Greenberg* v. *United States*, 405 U.S. 988.

Petitioner's claim for a new trial is based upon an affidavit of his co-conspirator McCrane that McCrane is prepared to testify as follows: "At no time prior to my assertion before the Grand Jury on April 27, 1973, of my right not to testify on Fifth Amendment grounds, did I ever tell Nelson Gross that I would assert such a plea" (Pet. App. 48a). Petitioner contends (Pet.

12-21) that McCrane's proposed testimony would contradict the trial testimony of William Preis that petitioner told Preis that McCrane would invoke the Fifth Amendment privilege against self-incrimination.

But, as the court of appeals stated (Pet. App. 85a-86a), McCrane's affidavit does not contradict Preis' testimony at trial. All Preis stated was that petitioner told him that "I [petitioner] happen to know that Joe McCrane is going to plead the Fifth when he comes up for his hearing * * * " (Tr. 2009). McCrane's affidavit does not contradict this statement; it merely states that McCrane did not tell petitioner of his intention to claim the Fifth Amendment before the grand jury.

Thus, assuming the correctness of McCrane's affidavit, petitioner could have learned of McCrane's plans to invoke the Fifth Amendment from sources other than McCrane. Alternatively, petitioner might have been simply speculating to Preis that McCrane would refuse to testify before the grand jury, or petitioner might have lied to Preis. Since petitioner was attempting to convince Preis to give perjured testimony to the grand jury, each alternative explanation satisfactorily eliminates any contradiction between the McCrane affidavit and Preis' testimony. Under these circumstances, petitioner cannot claim that McCrane's testimony would have probably produced an acquittal.[3]

2. Petitioner further argues (Pet. 9-12) that it is unacceptable to reconcile the McCrane affidavit with Preis' testimony on the ground that petitioner was either

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[3]As the court of appeals observed (Pet. App. 85a), if petitioner wanted McCrane to testify on his behalf, he could have sought a continuance in order that McCrane would be tried first and would be available thereafter to testify at petitioner's trial.

speculating or lying to Preis about McCrane's Fifth Amendment claim, because the evidence that McCrane invoked the Fifth Amendment was introduced to corroborate Preis' testimony. However, the fact that petitioner may have been speculating or lying to Preis does not undermine the credibility of Preis' testimony that petitioner told him that McCrane would claim the Fifth Amendment.

The evidence that McCrane claimed the Fifth Amendment was admitted to corroborate the fact that petitioner made those statements to Preis to convince him to testify falsely before the grand jury, and not to demonstrate the truthfulness of those statements. Thus, whether or not petitioner knew in advance that McCrane would claim the privilege, Preis' testimony that petitioner told him about McCrane's Fifth Amendment claim to assure Preis of the safety of embarking upon a course of perjury was corroborated by the evidence that McCrane did in fact claim the privilege before the grand jury.

But even assuming *arguendo* the correctness of petitioner's assertion of a conflict between McCrane's affidavit and Preis' testimony, such a conflict presents at best a question of credibility between McCrane and Preis. Evidence of this nature is insufficient to require a new trial. See, *e.g.*, *United States* v. *Spivey*, 508 F. 2d 1061, 1063 (C.A. 5); *United States* v. *Zane*, 507 F. 2d 346, 348 (C.A. 2), certiorari denied, 421 U.S. 910; *United States* v. *Leyba*, 504 F. 2d 441, 443 (C.A. 10), certiorari denied, 420 U.S. 934. Since petitioner offers no cogent reason why the jury would believe the proposed testimony of McCrane over that of Preis, there is no basis to petitioner's claim that McCrane's testimony would have probably produced an acquittal.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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